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Supreme Court of the United States

OCTOBER TERM, 1915.

MISSISSIPPI RAILROAD COMMISSION AND ROSS A. COLLINS, ATTORNEY GENERAL OF MISSISSIPPI.
Appellants,

vs.

MOBILE & OHIO RAILROAD COMPANY,
Appellee.

No. 653 256

Appeal From The Order of The District Court of The United States For the Southern District of Mississippi, Granting an Interlocutory Injunction.

BRIEF AND ARGUMENT FOR APPELLEE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

MISSISSIPPI RAILROAD COMMISSION AND ROSS A. COLLINS, ATTORNEY GENERAL OF MISSISSIPPI. *Appellants,* *vs.* MOBILE & OHIO RAILROAD COMPANY, *Appellee.*	No. 653 Appeal From The Order of The District Court of The United States For the Southern District of Mississippi, Granting an Interlocutory Injunction.

STATEMENT.

This is a direct appeal to the Supreme Court of the United States under Section 266 of the Judicial Code from an order of Circuit Judges Pardee and Walker and Judge Niles, District Judge of the Southern District of Mississippi, granting to Appellee, Railroad Company, an Interlocutory Injunction in this case against the Mississippi Railroad Commission and the Attorney General of the State of Mississippi, restraining them from enforcing an order made by the Mississippi Railroad Commission requiring the Mobile and Ohio Railroad Company to operate six passenger trains numbered 7, 8, 9, 10, 11 and 12 between points in the State of Mississippi.

The Bill filed by Appellee made the following case:

The Mobile & Ohio Railroad Company, an Alabama corporation, operates an interstate railroad extending from Mobile, Alabama, through the States of Alabama, Mississippi, Tennessee, Kentucky and Illinois, to St. Louis, Missouri. The general business depression due to the European War so reduced the income of the Company that it was compelled to reduce its expenses in order to live. A part of the general program of economy was the discontinuance of four interstate passenger trains which operated partly in the State of Mississippi and two passenger trains which operated entirely within the State of Mississippi. Prior to the discontinuance of said trains, the matter was taken up with the Railroad Commission of Mississippi and explained fully to them, and Appellee thought the Commission approved the plan, although there was no law of Mississippi that required appellee to secure permission of said Commission. The Alabama Commission, into which State four of the trains ran, and to whom the matter was submitted, approved the plan and authorized the withdrawal of the trains. Appellee gave notice to the public that it would discontinue said trains on September 28th, 1914. On September 26th, 1914, the Attorney General of Mississippi secured an injunction against Appellee in the Chancery Court of Lauderdale County, Mississippi. This injunction was dissolved on motion of the Railroad Company on October 5th, and said trains were withdrawn.

The Mississippi Commission cited the Railroad

Company to appear October 7th and show cause why it should not be required to continue to operate the said trains between Corinth, Mississippi and State Line, Mississippi. Appellee appeared before the Commission and all the facts were presented to the Commission and every defense of the Company made plain to it.

On October 7th Appellee had in operation three trains each way daily north of Meridian, Mississippi, and two trains each way daily south of Meridian, Mississippi, and on that date the Commission ordered Appellee to operate, beginning October 10th, in addition to the trains then being operated, two trains each way daily between Meridian, Mississippi and Waynesboro, Mississippi, Waynesboro being a point south of Meridian, Mississippi, and distant fifty-two miles. The four trains thus ordered placed in operation were in lieu of those four trains taken off which had formerly operated between Meridian, Mississippi, through Waynesboro, Mississippi, and through the State of Alabama, to Mobile, Alabama. The said orders of the Commission also directed Appellee to operate an additional train each way running north from Meridian, Mississippi to Okolona, Mississippi. These orders carried a combined penalty, named in the orders, of $3,000.00 per day for violation thereof.

The earnings of the Railroad Company were falling off at the rate of $3,000.00 a day when it was decided to take the trains off, and at the date the Bill was filed, the falling off in revenue of Appellee as compared with the previous year was $10,000.00

per day. The Railroad Company did not earn sufficient money in July, August and September, 1914, over its expenses, to pay its fixed charges and taxes. That on account of the business depression the volume of passenger traffic in the State of Mississippi had materially declined. That no one of said trains which were discontinued paid anything above the cost of operation and maintenance, and on the contrary, the direct cost to Appellee was greater than the income derived therefrom. That said trains were put on at the solicitation of citizens of Mississippi, and while it was known that they did not pay, they were retained while general business was good and Appellee was earning money over all its expenses. That when said trains, which were local trains, were taken off, the trains which were formerly fast through trains were made local trains to take care of the local passenger traffic in the State of Mississippi, and that the train service left on furnished an adequate and reasonable service to the people of Mississippi under the conditions existing at the time. The schedule of each of the trains left on and those taken off was set forth.

That the Railroad Commission of Mississippi had no power under the law of Mississippi to enter an order directing the number of trains to be operated by railroads. That the order was void for unreasonableness and deprived Appellee of its property without due process of law. That to comply with order would force Appellee to discriminate against other localities, contrary to law.

That this Railroad was made by Section 3964

of the Revised Statutes of the United States, a post road and that by an Act of Congress of the United States, approved September 20th, 1850, certain lands were granted the State of Mississippi to aid in the construction of a railroad from Mobile, Alabama, to a point near the mouth of the Ohio River, and by appropriate Acts of the Legislature said lands were granted to Appellee. By Section Four of said Act of Congress Appellee was made a public highway for the use of the United States Government without charge for the transportation of troops and property of the United States, and Appellee was required by said Act of Congress to carry the mails at a reduced price as may be fixed by Congress. That said orders of the Railroad Commission, if enforced, would endanger the life of Appellee as a carrier, by reason of its lack of income to meet its expenses. That the orders were so unreasonable as to endanger the life of the Railroad Company, and were, therefore, a direct burden on this instrument of the United States Government and a direct burden on and interference with interstate commerce.

That if the Commission and Attorney General of Mississippi were not restrained they would file suits against Appellee for violation of the orders of the Commission, which suits would harass and annoy Appellee, and the penalties that might be recovered were so great as to intimidate Appellee. That irreparable loss would result to Appellee unless the enforcement of said orders was restrained. That the orders of the Commission were confiscatory and deprived Appellee of its property without due process

of law, in violation of the Revised Statutes of the United States.

The United States District Court granted a restraining order on the sworn Bill on October 8th, 1914, and after due notice and the filing of numerous affidavits and the hearing personally of witnesses, Circuit Judges Pardee and Walker and District Judge Niles granted the interlocutory injunction prayed for, from which decree this appeal is prosecuted.

FACTS.

The facts as shown by the record are:

The Mobile & Ohio Railroad earned only $85,000.00 net revenue during the year ending June 30th, 1914. It had that much left after paying cost of operation, fixed charges, and taxes and before making any allowance for a dividend, or in any way providing for betterments and improvements to the property. (Rec. p. 55). The affairs of Appellee have been economically managed, and the present condition is not due to wastefulness or extravagance, but to the lack of business. This Appellee has never paid excessive dividends. The greatest in its history being five per cent. The stocks and bonds of the Company represent value received and the Company does not pay fixed charges on any fictitious indebtedness or watered securities of any kind. (Rec. p. 62).

August 2nd, 1914, the European War began, which caused a general business depression, particularly in the cotton territory served by Appellee (Rec. p. 56). The backbone of this Company's traffic is lumber and cotton, and the resulting movement of general freight due to these two commodities being marketed at a profit. In former years, the month of October was the heaviest cotton moving month. This year there is practically no cotton moving at all. The price is exceedingly low, and even at the low price, there is no market. The price of lumber

is very low and the market is demoralized to such an extent that it is not moving in any volume (Rec. p. 62).

The results of operation for July, 1914, showed a surplus of $11,000.00 over fixed charges and taxes and for August, 1914, a deficit after allowing for fixed charges and taxes, of $25,641.00; a deficit for September, 1914, of $113,627.00 (Rec. p. 67). Daily reports showed such a falling off of revenue that there was imperative need for immediate retrenchment (Rec. p. 56). The revenue of the Company was falling off in the State of Mississippi, as well as in the other states, at the rate of $10,000.00 per day, as compared with similar periods in former years (Rec. pp. 59, 62). The cash statement for September 30th, 1914, showed that the Treasurer had cash on hand $75,885.00 and had on hand audited approved vouchers awaiting payment aggregating $1,027,000.-00 (Rec. pp. 59, 74).

The Management of Appellee Company determined upon many economies. It took off traveling firemen, tie inspectors, car tracers, inspectors of agencies, relief agents, General Storekeeper's forces, clerks in various offices, yard masters and their clerks. It reduced repairs to locomotives and passenger train car repairs. It reduced coal chute labor and repairs to equipment. Telegraph operators were discharged. It reduced the Maintenance of Road Department and it closed certain shops. Among the first reductions was a material reduction in the pay of all general officers. The President of the Company, of his own initiative, reduced his sala-

ry twenty per cent. The Vice-President, of his own initiative, reduced his salary twenty per cent. The salary of all other officers has been reduced on a sliding scale up to ten per cent (Rec. p. 57).

As the tonnage decreased, the freight traffic expenses automatically reduced themselves to fit the lesser volume of business, but with passenger train service, trains have to be run without regard to the volume or number of passengers handled in each, consequently, if there is to be reduction in passenger expenses, it must be by reducing the number of trains operated (Rec. p. 56). Passenger trains Nos. 7, 8, 9, and 10 which ran between Mobile, Alabama, and Meridian, Mississippi. were discontinued and passenger trains Nos. 11 and 12, which run between Meridian, Mississippi and Okolona, Mississippi, were discontiued, and when those trains were taken off, the trains numbered 1, 2, 3, and 4, which at that time were fast trains and made few stops, were made local trains, and stopped at all points. Except one train, which did not stop at a place called Basic City and a place called Okatibbee, which places are not incorporated towns and have not any passenger business to amount to anything. To explain, formerly train No. 4, which is a north-bound train, made seven stops between Meridian, Mississippi and Okolona, Mississippi, and under the new schedule, it makes twenty-two stops. The other through trains were changed in the same way (Rec. p. 61).

These trains were not taken off to make up any loss being sustained on the business of the Company as a whole. They were taken off because they did not

themselves pay the cost of operation, and because due to the falling off of the business of the Company, as a whole, there was no general revenue out of which this Company could, during the depression, make up the deficit of these trains, as it had in the past (Rec. pp. 61, 62).

The earnings of trains 7, 8, 9, 10, 11 and 12 for the months of July, August and September, 1914, showed a revenue per train mile for July of 65c, for August of 64c, for September 56c. For the first five days in October, during which trains 7, 8, 9, and 10 were run, the passenger revenue per train mile of those trains between Meridian, Mississippi, and Waynesboro, Mississippi, was 36c. The passenger revenue per train mile of trains 11 and 12 for the first five days of October, 1914, between Meridian, Mississippi and Okolona, Mississippi, was 25c (Rec. pp. 68, 71).

The cost per passenger train mile of operating said trains was approximately $1.00 (Rec. pp. 60, 72, 115). The actual out-of-pocket cost of operating said trains 7, 8, 9, and 10, between Meridian, Mississippi and Waynesboro, Mississippi was 36.3c per train mile. (Rec. p. 66). Appellant's witnesses placed this direct cost at 25.54c per train mile. Out-of-pocket cost is defined by witnesses to mean the pay of employees on the train and fuel and supplies used on the train. It does not include any maintainance of way and structures or the wear and tear on the track or buildings; does not include the repair of the equipment used in said trains or any portion of the cost of dispatching said trains, or any portion

of the wages of station employees or any charge for damage to live stock, nor any proportion of traffic or general expenses, or advertising, etc., with all of which it should be charged its pro-rata. Rec. p. 67).

The Alabama Commission, through which State four of said trains ran, permitted the withdrawal thereof. (Rec. p. 58). No complaint was received from the States of Tennessee, Kentucky or Illinois. No discrimination against the State of Mississippi. The passenger service now provided for the State of Mississippi is the maximum service given any State through which this line runs. Mississippi has a better service than Alabama, part of Tennessee, Kentucky and part of Illinois, notwithstanding the density of population in the State of Illinois through which this road operates is 106.82 persons per square mile; Alabama 44.25, Tennessee 54.09, Kentucky 58.05, as against 41.02 in the State of Mississippi. (Rec. p. 58).

There are five towns and five small villages between Meridian, Mississippi, and Waynesboro, Mississippi, including Waynesboro. The total population of all these places and towns, according to the 1910 census of the United States, is 5,456 people. No town other than Meridian, Mississippi, has complained against the withdrawal of the trains. Sixty-one affidavits from practically all of the business men in said towns state that they do not think the taking off of the trains will materially injure the business of those towns, and they think the Railroad Company ought to be allowed to take them off, if they were

not paying. That due to the low price of cotton, the people are not traveling (Rec. pp. 75, 76).

The direct and immediate saving to Appellee by taking off of the trains was a reduction in its expenses of $10,000.00 per month (Rec. p. 59). The trains operated furnish adequate accommodation for the number of persons traveling (Rec. p. 75).

Meridian, Mississippi, is next in importance to St. Louis and Mobile. There is not much difference in size between Meridian, Mississippi and Jackson, Tennessee, and Cairo, Illinois. Meridian has better passenger train facilities at this time than has Mobile or Cairo (Rec. p. 65).

The order of the Railroad Commission directing that certain of these trains be operated between Meridian and Waynesboro, Mississippi, is unbusinesslike and will cost this Company even proportionately more per mile than the ordinary operation of said trains under the old schedule, because the distance between these two points is fifty-two miles and even if the trains made a turn-around trip they would only travel 104 miles per day and the contracts that this Company has with its employes provides a minimum mileage per day and per trip, which minimum has to be paid for, regardless of the miles traveled, and is considerably in excess of the round trip mileage between Meridian and Waynesboro (Rec. pp. 63, 64).

There are no facilities at the State lines between Mississippi and Alabama and between Mississippi and Tennessee for turning passenger trains

and to provide them would cost a large amount of money. (Rec. p. 64).

The Mobile & Ohio Railroad Company is what is known as a "land-grant railroad" and it has contracts for the carriage of mail with the United States Government. (Rec. p. 64).

If this Company is required to reinstate the trains in Mississippi, there are more traffic reasons and business reasons why the trains should be reinstated in other states. If required to reinstate these trains in Mississippi, since the curtailment has to be made and expenses reduced, the economies necessary thereto will have to be placed as a burden on the traffic and operations generally or in some other State (Rec. p. 64).

This Company would have been justified, according to the earnings of these trains, in taking them off prior to the general business depression felt by this Company along with other businesses generally, because we gave the trains a fair and honest trial for many months and they did not pay (Rec. p. 61).

Passengers could formerly leave Meridian for points south thereof to Mobile at the following hours: 3:10 A. M., 7 A. M. 1:55 P. M., and 4:00 P. M. Under the present schedule, they can leave at 3:10 A. M., and 2:43 P. M., (Rec. p. 23).

Passengers from the South under the former schedule would arrive at Meridian at 12:20 A. M., 11:00 A. M., 2:50 P. M. and 9:10 P. M. Under the present schedule, they arrive at Meridian from the south at 12:35 A. M. and 1:45 P. M., (Rec. p. 24).

North from Meridian, Mississippi, passengers

could leave Meridian formerly at 12:30 A. M., 8:00 A. M., 2:55 P. M. and 4:00 P. M. They can now leave at 12:45 A. M., 8:00 A. M. and 1:55 P. M. (Rec. p. 28).

Coming to Meridian from the north, they formerly arrived at Meridian at 2:55 A. M., 10:50 A. M., 1:50 P. M. and 8:00 P. M. They can now arrive at 3:00 A. M., 2:33 P. M. and 8:00 P. M., (Rec. p. 26).

There is a conflict in the facts on the question of the need of additional train service. Traveling salesmen testified that the schedule was inconvenient and under it they could not work as many towns, and lost a great deal of sleep. There was no testimony to show any need of restoring, or any inconvenience caused by the withdrawal of trains 11 and 12, and nearly all of Appellant's witnesses agreed that one additional train each way south of Meridian, Mississippi, would be sufficient, in their opinion.

The Commission stated that it thought one additional train would earn more than 40c per train mile. The Commission by its Chairman testified that it did not think the M. & O. should be required to run a passenger train if it did not pay operating expenses. In answer to the Court's question if he meant by "operating expenses" the pay of train employees and the cost of oil and supplies on the train only, he answered "Yes sir". The Court then said "Just the actual cost of operating?" The answer was "Yes sir, that is my view of it." (Rec. p. 130). Appellant introduced no witness from any town except Meridian, Mississippi.

BRIEF OF THE ARGUMENT.

I

Jurisdiction of the Court.

1. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and

(a) The orders of the Commission enjoined deny to Appellee the equal protection of the laws and deprive Appellee of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States;

(b) The said orders amount to a regulation of and are a direct interference with Interstate Commerce;

(c) The orders of the Commission impair the obligation of a contract, contrary to Article X of the Constitution, in that said orders will jeopardize the continued operation of Appellee's road to carry the United States' mails and troops, which the contract, created by the grant of lands by the United States on that condition accepted by the State, obligated Appellee to do.

These several claims of violation of Appellee's constitutional rights being made in good faith and not frivolously, the Court had jurisdiction irrespective of citizenship of parties.

I. C. R. R. vs. Adams, 180 U. S. 28, at pp. 36, 37.

The claim being that the said Orders of the Commission jeopardize the continued operation of Appellee's line as carrier of the United States mail and as a post road, and that the Acts of Congress referred to made a contract, the determination of that question depends upon the construction of the Acts of Congress and involves a Federal question.

Northern Pac. v. Townsend, 190 U. S. 267.

2. Diverse citizenship of the parties:

The jurisdiction of the Court does not depend solely on the diverse citizenship of the parties. This is a question of law. The Acts of Alabama and Mississippi constituting the Charter of Appellee are set forth in the Appendix to this brief.

The case of *Railroad Commission v. F. L. & T. Co.,* 116 U. S. 307, does not hold that the M. & O. R. R. Co. is a citizen of the State of Mississippi in the sense that the word "citizen" is used with relation to the Federal Judiciary.

The fact of prior incorporation in Alabama is controlling insofar as the jurisdiction of the Federal Court is concerned.

Goodlett v. Louisville & Nashville R. R. Co., 122 U. S. 391.

St. Louis & San Francisco Ry. v. James, 161 U. S. 545;

Louisville, etc., Ry. v. Louisville Trust Co. 174 U. S. 552;

Southern Railway v. Allison, 190 U. S. 326;

Patch v. Wabash R. R. Co., 207 U. S. 277.

Aside from the indisputable legal presumption that a state corporation when suing in United States Courts is composed of citizens of the State which created it, in this case the State of Mississippi did not attempt to constitute any association of natural persons a corporation, but conferred certain powers on the already incorporated Alabama corporation.

Appellant made no point in argument or in Brief against the jurisdiction of the Court.

II.

An Appellate Court will not Reverse the Order of a Lower Court Granting or Refusing an Interlocutory Injunction unless clearly Improvidently Granted.

The Appellate Court in passing on an order granting a preliminary injunction does so from the standpoint of the Court granting the injunction.

> *U. S. vs. B. & O. R. R. Co.*, 225 U. S., 306 at p. 323.

The granting of the preliminary injunction was the exercise of sound judicial discretion and the Court's action should not be disturbed unless improvidently exercised.

> *Duplex Printing Co. v. Campbell, etc.*, 69 F. R. 250, at p. 252;
> *Southern Pac. vs. Earl*, 82 F. R. 690, at pp. 691, 692.

The granting of a preliminary injunction does not determine the merits, and on a motion to dis-

miss, and an appeal from an Order refusing, the Appellate Court will not go into the question of whether the State has or has not impaired the obligation of a contract, nor will it go into the merits of the case further than to be able to say whether the Court has improvidently exercised its discretion.

City Ry. Co. vs. Citizens St. R. R. Co., 166 U. S. 557, at p. 564;
Rahley vs. Columbia Phonograph Co., 122 F. R., 623, at p. 625.

The obvious purpose of Congress in requiring in Section 266 of the Judicial Code notice to the opposite side and action by three United States Judges on an application for an injunction in a case of this kind was to prevent hasty, ill-advised action and when an injunction is secured under Section 266 of the Judicial Code the exercise of the discretion of three Judges should be given even greater weight.

III.

The Law of Mississippi does not Authorize the Railroad Commission of Mississippi to enter the Orders Enjoined, and the Threatened Enforcement of said Orders, with a Heavy Penalty for Failure to Comply, Denied to Appellee the Equal Protection of the Law.

It is a denial of equal protection of the laws and a deprivation of property without due process of law if these orders require the Railroad Company

to do an act not required of the Railroad Company by any law, or any valid order under any constitutional law.

Appellee, Railroad Company, denies that the Railroad Commission of Mississippi has the power to order it to put into operation the said trains.

The Railroad Commission is the administrative board, so to speak, of the Legislature, and can only exercise the specific statutory authority given it.

There is no statute of Mississippi giving the Railroad Commission general supervision over railroad companies.

> *G. & S. I. R. R. Co. vs. R. R. Com. of Miss.*, 94 Miss., 124.

Section 4849 of Mississippi Code of 1906 (App. Brief p. 10) does not confer power on the Railroad Commission to require operation of six additional trains. The statute gives to the Commission the right to hear and determine "all complaints made of any time schedules * * * on the ground that the same, in any respect, is, in the case of time schedule, unnecessarily inconvenient for the public." This means the Commission may rearrange the arrival and departure time of trains. The Mississippi Supreme Court in the *G. & S. I. Case, supra,* said as to the meaning of Section 4849:

> "In our opinion the authority to determine complaints made of any time schedules * * * conferred upon the Commission authority only

to regulate the time at which any train should arrive and depart from any regular stopping place, etc."

The orders should not be enforced against Appellee for the further reason that Section 4849 of the Mississippi Code provides that the Commission shall docket and hear all *complaints,* and the complaint must be in writing and the Commission *shall* furnish the railroad with a copy thereof. In this case there was no complaint, and if there was Appellee was served with no copy thereof.

IV.

The Orders of the Commission Deprive the Railroad Company of its Property Without Due Process of Law.

The orders deprive Appellee of its property without due process of law in that they compel the operation of six trains no one of which pays its full cost of operation.

The service rendered is a part of the rate. If it is illegal to lower the rate and thus take the property of the carrier it must be illegal to maintain the rate and require such additional service as would take the property of the carrier.

The constitutional guaranty to the Railroad Company is to receive just compensation for the service given the public.

The Railroad Commission Case, 116 U. S. 307, at p. 331;

St. L. & S. F. Ry. Co. v. Gill, 156 U. S. 649, at p. 657;
Minnesota Rate Cases, 230 U. S. 352, at p. 433.

The carrier is entitled to a fair return on a reasonable value. The State cannot justify unreasonably low state rates on the ground of large profits on its interstate business.

230 U. S., *supra*, pp. 434, 435.

The showing made that no one of the trains ordered operated paid its cost of operation, and the showing made that by taking off the said trains Appellee saved $10,000.00 per month, is proof sufficient of a taking of Appellee's property without due process of law.

"* * * If the carriers total income enables it to declare a dividend that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate."

Interstate Commerce Commission v. Union Pac. R. R., 222 U. S. 541, at pp. 546, 549.

The Carrier is entitled to receive some compensation beyond the mere cost of that which it does.

Southern Ry. v. St. L. Hay & Grain Co., 214 U. S. 297, at p. 301.

If the fact had been that the freight business of

the Mobile & Ohio Railroad Company in the State of Mississippi had been conducted at a profit, that would not justify installation of additional passenger train service at a material loss; otherwise shippers of freight would pay not only the cost of carrying their freight and a reasonable profit thereon, but would be required to make up the deficit in the operation of the said passenger trains.

If a state law requires the installation of a small physical facility, or the operation of a single train, and the proof is that the expense to the carrier is, comparatively speaking, small or trivial when weighed against a great public interest or an admittedly needed convenience to many people, then this Court will not hold that such small expense, or proof that some loss will result, in and of itself and by itself amounts to a taking of property without due process of law, provided the carrier at the time is earning a fair return upon its entire business.

Wisconsin, etc., R. R. Co. v. Jacobson, 179 U. S. 287, at pp. 296, 301, 302;

Minneapolis vs. St. Louis R. Co., 186 U. S. 257, at pp. 265, 266;

Atlantic Coast Line v. North Carolina, 206 U. S. 6, at pp. 16, 19, 20, 22,-27;

Missouri Pac. Ry. vs. Kansas, 216 U. S. 262, at pp. 277-8-9;

Northern Pacific Ry. v. North Dakota, 216 U. S. 579;

Missouri Pacific Ry. v. Tucker, 230 U. S. 340;

Missouri Pacific Ry. v. Nebraska, 217 U. S. 196.

No one of the cases cited is authority for sustaining an order of a state commission which causes the carrier substantial and heavy loss to supply a disputed need (not a primal duty), to a few people. This is submitted as a correct interpretation of this Court's decisions. Go one step further—if the service described is ordered at a time of general business depression and financial emergency to the carrier when it is not earning its fixed charges and taxes, to say nothing of a fair return on its entire business, and you have the instant case; and to say that any warrant is found in this Court's decisions upholding such action is an error.

V.

Do the Orders Directly Interfere with Interstate Commerce?

Appellee is an interstate road, under one management, with one treasury. The right in Mississippi to prevent discrimination against Mississippi does not confer power on Mississippi to require a preference over other states served. Appellee's duty is to several sovereignties and to the general government.

The Bill alleges a heavy loss if the trains are operated; that the earnings will not stand the loss and to force it to operate the trains at a loss will jeopardize its whole operations. If correct, there

cannot be more direct interference with interstate commerce, or a greater burden put upon it.

One test of whether an order is void as a direct regulation of interstate commerce is by "considering the nature of the order, the character of the interstate commerce trains to which it applies, and its necessary and direct effect upon the operation of such train."

> *A. C. L. R. R. Co. vs. Wharton,* 207 U. S. 328, at p. 334.

If the effect of the order is only an incidental interference with interstate commerce it does not violate the constitution, but if direct and material it is an improper exercise of the police power.

> *Mississippi Railroad Commission v. I. C. R. R. Co.,* 203 U. S. 335, at p. 342.

Any order of a state commission which impairs the usefulness of facilities for interstate traffic is a burden on interstate commerce.

> *Railroad Commission Cases,* 116 U. S. 307, at p. 334.

The special insistence of the officers of one state should not be allowed to cast an undue burden on the others.

> *Cleveland etc., Ry., v. Illinois,* 177 U. S. 514 at p. 518.
> *M. K. & T. R. R. vs. Love,* 177 F. R. 494.

If the burden is real and sufficient, substantial and not incidental, it is none the less violative of the Constitution, because on the income instead of being a physical interference. The result is the same.

VI.

The Orders Enjoined Interfere with an Instrument of the United States Government.

Congress may make or authorize contracts with corporations for services to the Government, and may grant aid by land in preparation for and in the performance of such service.

> *Wilson v. Shaw* 204 U. S. 24, at p. 33;
> *Thompson v. Union Pacific Ry. Co.*, 9 Wallace 579; 19 Law Ed. 792, at p. 798.

Section 3964 of the United States Revised Statutes constitutes this railroad, with other railroads, a post road. By Act of Congress approved September 20th, 1850, certain lands were granted in trust to the State of Mississippi to aid in the construction of a railroad from Mobile, Alabama, to a point near the mouth of the Ohio River. By Section 4 of said Act of Congress the road constructed under the Act was made a public highway for the use of the United States Government. The State of Mississippi granted such lands to Appellee by appropriate act.

This Railroad being an instrumentality of the United States in the performance of its duties as a post road, any burden imposed thereon by a state

which would hinder the performance of the duty, is beyond the power of the state.

Railroad v. Peniston, 18 Wallace 29; 21 Law Ed. 787, at p. 792.

VII.

Enforcement of the Orders Enjoined Would Impair the Obligation of a Contract.

The United States Government granted to the State of Mississippi a large acreage of land to aid in the construction of a railroad. The State of Mississippi granted the land to the Mobile & Ohio Railroad Company. One of the obligations of the grant was that the railroad should be a public highway for the use of the United States Government without charge for the transportation of troops, etc.

That this grant by the United States to the State upon conditions and the acceptance of this grant by the State constituted a contract.

McGee v. Mathis, 18 L. Ed. 314 at p. 318.
U. S. v. Union Pacific, 98 U. S., 613.
Pearsall v. Great Northern Ry. 161 U. S., 646, at pp. 661-665.

The orders of the Commission enjoined are so unreasonable and arbitrary under the facts shown in the record, as to cause such a loss as would render doubtful the continued operation of the whole line, and result in its inability to continue to perform its

obligations assumed under the contract set forth above.

VIII.

Is the Present Passenger Service Adequate?

There is a general duty upon a railroad company, chartered to do a passenger business, to receive and carry passengers, that is a primal duty. If that duty is met and the question is one of an additional passenger train for the convenience of the public, the problem is, how many people have to demand the right to the convenience or the right to ride on the additional train before there is a legal duty on the carrier to install the train? The duty varies with circumstances, and what is adequate must be ascertained from the situation, not only of the citizens but of the carrier.

The facts, properly analyzed, disclose no conflict on the point that all of the said trains failed to pay their actual cost of operation.

The best and only reliable test of the need of an additional passenger train facility is whether or not a sufficient number of people claim the right to use the train as will, at the statutory rate, pay the cost of operation thereof and a reasonable profit.

Com. v. Fitchburg R. Co., 12 Grey (Mass.), 180.

State of Iowa v. Old Colony Trust Co., 215 F. R. 307, at p. 312.

Jack v. Williams, 113 F. R., 823; 145 F. R. 281.

The duty owed by the Railroad is to the public and an individual has no right to demand that a train be run to suit his convenience. The individual secures whatever right he has by virtue of being one of the public or community, and the duty to the community does not arise until a sufficient number of people therein demand the right to ride, to create the duty, and that number must at least be such as will at the lawful rate pay the cost of operation of the train.

An examination of the facts upon which the order of the state commission is based being necessary to determine whether or not there has been an unconstitutional exercise of power, the Courts will examine the facts.

> *Mississippi Railroad Commission v. Illinois Central Railroad Company,* 203 U. S. 335, at p. 345;
> *A. C. L. R. R. v. Wharton,* 207 U. S. 328, at p. 334.

To permit one state to determine the adequacy of service, regardless of the rights of citizens of other states is an error. Adequacy under the facts of this case should be viewed from the standpoint of the duty the carrier owed to all of the states served by it.

When, as here, there is a conflict among the people at interest, the citizens of one city, Meridian, Mississippi, testifying to the inconveniences of travel (in one direction only), and the citizens of all other

towns served testifying that the present service was adequate, due to the small number of people now travelling because of lack of money; it appears that the weight of outside opinion evidence is an offset and if you add to that the positive evidence of the railroad that very few passengers ride on the said trains ordered operated, and the certain proof of loss from their operation, there seems no reasonable ground for holding the present service inadequate, especially under the financial circumstances detailed.

ARGUMENT AND ANSWER TO APPELLANT'S BRIEF.

I.

Jurisdiction of the Court.

The Bill alleges that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars. The further averment is that if the orders are not enjoined the total penalties per day for a violation thereof would be Three Thousand Dollars. The further averment is that the orders of the Mississippi Railroad Commission would require plaintiff to run the said trains at the cost to plaintiff of the many thousand dollars which it would be required to expend without any return. In addition to these averments of the bill, which the decisions plainly hold to be sufficient, the value of the matter in dispute has been further detailed and proven by the affidavits in support of the bill, which show that the direct saving per month to the Railroad Company by taking off said trains is Ten Thousand Dollars per month. The averments of the bill are that Appellant is duly organized under the laws of the State of Mississippi and Appellee is a corporation organized and existing under the laws of the State of Alabama.

The suit arises under the Constitution and the Laws of the United States in the following particulars:

(1) The orders of the Commission deny to plaintiff the equal protection of the laws, contrary

to the Fourteenth Amendment to the Constitution of the United States;

(2) The orders of the Commission deprive plaintiff of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States;

(3) The orders of the Commission are a didect interference with interstate commerce and amount to a regulation of such commerce, contrary to the power given to Congress to regulate commerce among the several states;

(4) The orders of the Commission impair the obligation of a contract, contrary to Article X of the Constitution, in that said orders will jeopardize the continued operation of Appellee's road to carry the United States' mails and troops, which the contract, created by the grant of lands by the United States on that condition accepted by the State, obligated Appellee to do.

The orders of the Commission also jeopardize the life of Appellee, and thus would destroy Appellee as a post road contrary to Section 3964 of the Revised Statutes of the United States, creating Appellee a post-road.

In *Illinois Central Railroad Co. vs. Adams,* 180 U. S. Rep. 28, at pp. 36 and 37, the Court said:

> "The bill clearly avers a case arising under the Constitution of the United States, and is one of which the Circuit Court would have jurisdiction irrespective of the citizenship of the parties. As we had occasion to observe in City

> Railway Company vs. Citizens' Street Railroad Company, 166 U. S. 557, 564, 'whether the State had or had not impaired the obligation of this contract was not a question which could properly be passed upon, on a motion to dismiss so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one.' See also New Orleans vs. New Orleans Water Works Company, 142 U. S. 79, 88."

In the case of *Northern Pacific Railway Company vs. Townsend,* 190 U. S. 267, the facts were that the United States had granted a right of way by a statute to a railroad, and there was claim by homesteaders of adverse possession against the railroad.

The Court said:

> "Conceding the adverse possession and its efficacy under the state law as against the railroad right of way, to be as found by the court, the sole question which arises then for decision is whether, in view of the provisions of the act of Congress to which we have referred, an asserted title by adverse possession can be made efficacious as respects the property in controversy. And depending, as this question does, upon the nature and effect of the acts of Congress, its solution necessarily involves a Federal question." p. 270.

On The Question Of Citizenship:

Inasmuch as the jurisdiction in this case does not rest solely on citizenship of the parties only

brief reference will be made to the decisions.

Appellant, on page 13 of its brief, referred to the case of Railroad Commission v. Farmers Loan & Trust Company, 116 U. S. 307, and said:

> "It was adjudicated in that case that the Mobile & Ohio Railroad Company was for purposes of operation and control a Mississippi corporation, insofar as its line and business in Mississippi were concerned."

If Counsel intended by this reference to claim that this Court had held that the Mobile & Ohio Railroad Company was a citizen of Mississippi in such a sense as not to make a controversy between that Railroad Company and a citizen of Mississippi a controversy between citizens of different states within the meaning of the Act of Congress conferring jurisdiction on District Courts of the United States, and permitting removal of cases to the courts of the United States, then it is submitted that the Railroad Commission Cases do not sustain the point.

Appellant sets out the pertinent paragraphs of said decision in its brief on pages 13 and 14. The Court, it is submitted, held that the corporation created by each state is for all the purposes of local government a domestic corporation and its railroad within the State is a matter of domestic concern. It then said:

> "Every person, every corporation everything within the territorial limits of a State is while there subject to the constitutional authori-

> ty of the State government. Clearly under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the State which is the lawful subject of State Government."

The Court then went on to hold that the State could regulate freights and fares exclusively within the State, and prevent the Company discriminating against persons and places within Mississippi, and make needful police regulations, etc. This Court, we respectfully submit, did not hold that the Mobile & Ohio Railroad Company was a citizen of Mississippi in the sense that the words "citizen" and "citizenship" are used with relation to the Federal Judiciary.

If the Court in the above case had meant to hold that the Railroad Company was a domestic corporation in Mississippi, then it is not understood why it should specifically point out that with reference to the government of such corporation in certain particulars, the State might govern it "as it does all domestic corporations." Concededly the State has the power to control a foreign railroad corporation within its boundaries in the particulars set forth just as it may a domestic corporation, and this Court held nothing more in the case referred to.

The Mobile & Ohio Railroad Company was chartered by Act of the Alabama Legislature February 3rd, 1848, Acts of Alabama of 1848, page 225, (Appendix p. 117). That Act set forth the names of the incorporators, the amount of capital stock,

powers of the corporation, etc. The Mississippi Legislature, by an Act approved February 17th, 1848, found in the Laws of Mississippi of 1848, page 83, (Appendix p. 131) enacted in part as follows:

> "WHEREAS, the State of Alabama, by an act approved 3rd February, A. D. 1848, enacted as follows: (here is set out in full the Alabama Act).
>
> AND WHEREAS, the State of Mississippi is desirous to aid in accomplishing the objects of the said act, therefore,
>
> SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That the Railroad described in the above recited act be extended in the State of Mississippi from the Alabama line to the State of Tennessee, in such a direction and on such a route as shall be deemed most expedient; and that as to said extension, there is granted to the said Mobile and Ohio Railroad Company, when organized, the same rights, powers, and privileges as are granted to it within the State of Alabama by the same act, subject, however, to the same and similar conditions, restrictions, modifications, and provisions as are in said act above recited, contained, and set forth, excepting the provision contained in section 15, of said act; and the said act is hereby concurred in and adopted within the State of Mississippi, in reference to the said railroad as extended, and in reference to the said Mobile and Ohio Railroad Company, with the exception of that portion contained in Section 15 as before stated."

Appellee refers to the following cases:

St. Louis & San Francisco Ry v. James, 161 U. S. 545;
Louisville, etc., Ry v. Louisville Trust Company, 174 U. S. 552;
Southern Railway v. Allison, 190 U. S. 326;
Patch v. Wabash R. R. Co., 207 U. S. 277.

The foregoing decisions clearly hold that natural persons being created a corporation in one State and such corporation being thereafter created a corporation of another State, either by special Act or in obedience to a general law, remains for the purposes of jurisdiction of the Courts of the United States a citizen of the State by which it was originally created.

In the *James* case, 161 U. S. 545, after referring to a number of cases, the court said: (pp. 562, 563)

> "To fully reconcile all expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in "controversies between citizens of different States."

This Court in the case of *Southern Railway v.*

Allison, quoted with approval from the *Louisville Trust Co[illegible]ny* case, as follows:

> "a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the State by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either State, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States."

The Court also, in the *Allison Case,* set forth the particular facts with reference to the charter of the Memphis & Charleston Railway, which led the Court in that case to hold the Memphis & Charleston Railway to be an Alabama Corporation, and said in conclusion:

> "The difference between the above case and the cases we have already referred to is plain and fundamental, but in any event we regard the James case, reaffirmed and approved as it is by that of *Louisville &c. Railway v. Trust Company,* 174 U. S. supra, as decisive of the case before us."

The Legislature of Mississippi could have, if it had so desired, created a corporation in the State of Mississippi. Instead of doing that, it very clearly conferred powers upon "The said Mobile & Ohio Railroad Company," the Alabama corporation. It did not constitute any association of natural persons a corporation and confer powers upon them. It did not provide separate stock. It did not require stock books to be opened in the State of Mississippi, nor did it require elections to be held in the State of Mississippi, as was the case with the Memphis & Charleston Railway Company charter, set forth in the case of *Memphis & Charleston R. R. Co. vs. State of Alabama,* 107 U. S. 581.

Aside, however, from the above cases laying down the general rule, we submit that the case of *Goodlett v. Louisville & Nashville Railroad Co.,* 122 U. S. 391, is in every respect similar to the case at bar, upon this question of jurisdiction. If the Court will examine the language of the Tennessee statute therein quoted, in reference to the Louisville & Nashville Railroad Company, a corporation first created by the State of Kentucky, it will find it to be entirely similar to the language used in the statute of Mississippi in reference to the Mobile & Ohio Railroad Company, a corporation created by the State of Alabama. In the Goodlett case it was decided that the Tennessee act was a license granted to a Kentucky corporation; so, in the case at bar, the State of Mississippi intended simply to grant a

license to the Mobile & Ohio Railroad Company, a corporation of the State of Alabama.

II.

An Appellate Court will not Reverse the Order of a Lower Court Granting an Interlocutory Injunction Unless Clearly Improvidently Granted.

This is an appeal from a decree of three United States Judges granting Appellee's application for an interlocutory injunction, and this court will, as a court of appeals, not reverse, unless on the record it is thought the injunction was improvidently granted. The Appellate Court in passing on an order granting a preliminary injunction, does so from the standpoint of the court granting the injunction.

The Supreme Court of the United States, in the case of *United States et al. v. B. & O. R. R. Co.*, 225 U. S., 306, which was an appeal from the granting of a motion for a temporary injunction by the Commerce Court, employed this language:

> "Under the general principles of equity, where a court is called upon to decide whether it will allow a preliminary or pendente lite injunction the duty arising requires it to be determined whether on the face of the papers presented there is such an equitable cause of action presented as justifies the issue of a preliminary injunction to preserve the status pending the suit, that is, to afford an opportunity for a trial of the issues presented. Necessarily it is true also that where an appeal is allowed from an

order granting a preliminary injunction the reviewing court is put to the duty of determining whether on the face of the papers the court below erred as a matter of law in granting the preliminary injunction." p. 323.

In the case of *City Ry. Co. v. Citizens Ry. Co.*, 166 U. S. 557, there was a bill filed in equity to enjoin the City Railway Company, one of the grounds being the impairment of a contract in violation of the Constitution of the United States. A motion was made to dismiss the bill. This court, in its opinion in that case on this point, said:

> "Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. New Orleans v. New Orleans Water Co., 142 U. S. 79, 88." p. 564.

The rule as stated by Judge Taft in the case of *Duplex Printing Press Co. v. Campbell Printing Press & Manufacturing Co.*, 69 F. R., 250, at p. 252, is as follows:

> "The motion for a preliminary injunction necessarily involved the exercise by him of a sound judicial discretion in granting or withholding it. By no action of his could he enable this court finally to determine all the questions between the parties to the action, because it is

not within the proper province of this court to do so on an appeal from an order granting a preliminary injunction. This is settled by the decision in Blount v. Societies Anonyme, etc., 6 U. S. App. 335, 3 C. C. A. 455, 53 Fed. 98, where Mr. Justice Jackson, speaking for this court, discusses the proper scope of action by a circuit court of appeals upon an appeal from a preliminary injunction under the seventh section of the circuit court of appeals act. We are to consider the correctness of the order from the same standpoint as that occupied by the court granting it, and if we find, after a consideration of the grounds presented to that court for its action, that its legal discretion to grant or withold the order was not improvidently exercised, we should not disturb its action."

In the case of *Southern Pacific Company v. Earl* 82 F. R. 690, the Circuit Court of Appeals for the Ninth Circuit, in passing upon an appeal from an order granting a preliminary injunction laid down the following rule:

"The principles which govern courts in granting preliminary injunctions in this class of actions are the same upon which courts of equity constantly act in granting such injunctions in other cases of equitable cognizance. The order for such an injunction does not finally determine the rights of the parties to the action, and its only purpose and effect are to preserve the existing state of things until the case has been fully heard by the court, and the entry of a final decree therein. And it is equally well

settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and that it is not necessary that the court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, to adopt the language of the court in Georgia v. Brailsford, 2 Dall. 402, 'a probable right, and a probable danger that such right would be defeated without the special interposition of the court,' is all that need be shown as the basis for such an order. See, also, Blount v. Societe, etc., 3 C. C. A. 455, 53 Fed. 98, and cases therein cited.

Inasmuch as the granting of an injunction pendente lite is committed to the discretion of the trial court, it necessarily follows—and so the authorities uniformly hold—that upon an appeal from such an order the only question which the appellate court is called upon to determine is whether the court, in making such an order, abused its discretion. If there was before the court evidence having a reasonable tendency to make out a prima facie case for the plaintiff, the order granting the injunction will generally be affirmed, notwithstanding there may have been a material conflict in the evidence submitted to the court at the time of making its order; or, stating the same rule in different words, the decision of the judge who made the order will not be reversed unless it appears, after a consideration of all the evidence upon which his action was based, that his legal discretion to grant or withhold the order was improvidently exercised. Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g. Co., 16 C. C. A. 220, 69 Fed. 253; Bissell Carpet-

> Sweeper Co. v. Goshen Sweeper Co., 19 C. C. A. 25, 72 Fed. 550. We proceed then, to consider whether the circuit court exceeded its legal discretion in making the order appealed from." pp. 691, 692.

The above case in the 82 F. R. was followed by Judge Simonton in an opinion rendered by him in the Circuit Court of Appeals, Fourth Circuit, in the case of *Rahley vs. Columbia Phonograph Co.*, 122 F. R. 623, at p. 625, as follows:

> "The appellant sets out 10 assignments of error. They all go to the merits of the controversy, and could very properly be discussed if the case were here after a full hearing. But the question this court at this stage is called upon to decide is whether the court below, having the discretion to grant or refuse the temporary injunction, has in this instance abused its discretion.
>
> The law is so well stated by the Circuit Court of Appeals, Ninth Circuit, in The Southern Pacific Company v. Earl, 27 C. C. A. 185, 82 Fed. 690, that we adopt it."

The Court then set forth the above quoted paragraph from the *Earl* case.

In this case, Appellee recognizing how one-sided ex parte affidavits are, as a rule, produced its witnesses before the Court for examination and cross-examination, and they were so examined.

It is submitted that Congress in its wisdom enacted Section 266 of the Judicial Code, which made it necessary to give notice and to secure the action of

a Court of three judges before an interlocutory injunction could be had restraining the enforcement of a state statute or restraining the action of any officer in the enforcement of such statute, and this was for the obvious purpose of preventing ill advised action in such an important matter by a single judge, and it is submitted that even greater weight should be given by this Court to the exercise of such discretion by three Judges than has been the case with interlocutory injunctions heretofore, and the discretion so exercised should not be set aside by this Court, unless on the record clearly erroneous, and this regardless of whether on the final trial of the case on its merits the action of the lower court may or may not be sustained.

III.

The Law of Mississippi does not authorize the Railroad Commission of Mississippi to enter the orders enjoined, and the threatened enforcement of said orders, with a heavy penalty for failure to comply, denied to Appellee the equal protection of the law.

It is a denial of equal protection of the laws and a deprivation of property without due process of law if these orders require the Railroad Company to do an act not required of the Railroad Company by any law, or any valid order under any constitutional law.

Appellee, Railroad Company, denies that the

Railroad Commission of Mississippi has the power to order it to put into operation the said trains.

The Railroad Commission is the administrative board, so to speak, of the Legislature, and can only exercise the specific statutory authority given it. The Supreme Court of Mississippi in enumerating the powers given the Commission by the Legislature, said:

> "The Railroad Commission of the state of Mississippi is a creature of the Legislature. It exists only by virtue of chapter 139 (section 4826-4899) of the Code of 1906, and all of its powers and duties are therein specially enumerated. *It may be stated, in this connection, that we have no general statute submitting to the Railroad Commission general supervision over railroad companies, as will be found in some states; and, while general power is given to the commission to do many things, however, in each instance it will be found that the power is specifically granted.* (Italics the writer's) It is universally held that a Railroad Commission is a mere administrative or advisory board created to carry out the will of the Legislature, and that, before it can do any act, it must be able to point to its grant of power from the Legislature, which power must affirmatively appear and must be given in clear and express terms, and nothing will be had by inference."

Gulf & S. I. R. R. Co. v. Railroad Commission of Mississippi, 94 Miss. 124, 49 Sou. Rep. 118.

There has been no amendment of the laws of

Mississippi in regard to the supervision of common carriers touching this point since the above decision was rendered. That decision of the Mississippi Supreme Court, interpreting the laws of the State of Mississippi, establishes beyond argument that the Legislature has not delegated to the Railroad Commission general supervision over railroad companies. It follows, that if the Railroad Commission of Mississippi had the power to enter the orders it must have secured the power by a specific statute conferring the authority. It is asserted that Appellant has failed in its brief to refer the Court to any statute of Mississippi which confers upon the Railroad Commission the power to enter an order requiring Appellee to put into operation on its line six daily trains, or any trains. Attention is called to the fact that no one of these trains were originally put on under any order of the Railroad Commission.

Appellant states that it has been the custom for the Commission to exercise general powers of supervision (Appellant's Brief, p. 7). There is not in the record any proof of such custom, and in the case of *G. & S. I. R. R. Co., supra,* the Court held that there was no statute giving to the Railroad Commission general supervision.

Appellant quotes as sustaining the power of the Commission Section 184 of the Constitution of Mississippi (App. Brief p. 8). That Section of the Constitution provides that railroads which carry persons or property for hire shall be public highways, and all railroad companies so engaged shall be common carriers, etc. This is not denied, and it is not under-

stood what pertinency that section has to the point at issue.

Appellant next quotes Section 4839 of the Mississippi Code (App. Brief, p. 8). This section sets forth what is discrimination and defines extortion, and, it is submitted, has no bearing on the point now discussed.

Appellant, after setting forth the above referred to sections, states:

> "It is, therefore, clear that the State has a right to make regulations governing the facilities and charges on public highways."

The State may have the right but that in no wise answers the question asked, which is,—Point out where the State, through its Legislature, has delegated to the Railroad Commission of Mississippi the authority to regulate the number of trains operated on the line of any railroad in the State of Mississippi?

Appellant then cites as sustaining the proposition that the State has a right to make regulations governing the facilities and charges on public highways, which proposition is not denied, the following cases:

> *Stone vs. Yazoo, etc., Co.*, 62 Miss., 607;
> *Stone vs. Natchez R. R. Co.*, 62 Miss., 646;
> *A. & V. R. R. Co. vs. Railroad Commission*, 38 Sou., 356; 86 Miss. 667.

It seems unnecessary to discuss in detail the

above three cases which have been cited by Appellant. The two cases in the 62nd Mississippi hold generally, that the power of a state to fix rates of compensation for the carriage of freight within its borders did not interfere with the Commerce Clause of the Constitution of the United States, and that while the Railroad Company could fix its rates within the limits of its charter, it was, nevertheless, subject to the control of the State and must yield to the authority of the State to supervise it, and that the State had the right to create the agency to exercise such supervision. The A. & V. case in the 86 Mississippi held, generally, that the tariff which was attacked operated so as to work an unjust discrimination. It further held that the Commission had the power to make a change in the tariff of rates on the ground that the charge made therein was more than just compensation, or worked unjust discrimination.

It is respectfully submitted that cases which decide that a state *may* regulate carriers through a Commission do not aid us in determining whether the Mississippi Railroad Commission *has* been empowered by the Legislature to require the installation and operation of the trains which Appellee was ordered to operate.

Appellant next refers to and quotes Section 4843 of the Code of Mississippi of 1906 (App. Brief, p. 9). A reading of this Section will show that all that was attempted to be done by that section was to give to the Railroad Commission the power to fix the charges and to supervise and regulate all

persons, who may own or operate express, telegraph, telephone and sleeping car companies, car service associations, or other associations governing or controlling cars or rolling stock of railroads in this state *in the same manner as railroads.* It cannot be seriously contended that this section confers any authority upon the Commission to order the installation of certain trains.

We now come to the only section which, it is submitted, could possibly, under any proper construction, aid us in deciding this question, and that is Section 4849 of the Code, which is set out in full in Appellant's Brief (p. 10).

One of the cardinal rules of interpretation of a legislative act is to ascertain what is the usual, ordinary and customary meaning of the language employed. The statute gives the Commission the right to hear and determine "all complaints made of any time schedule * * * on the ground that the same, in any respect, is, in the case of time schedules, unnecessarily inconvenient for the public." A time schedule means what we ordinarily call a timetable, or a list of trains showing the arrival and leaving time of said trains from stations. The statute gives the Commission the right to determine a complaint of any time schedule, not generally, but "on the ground that the same, in any respect, is, *in the case of time schedule, unnecessarily inconvenient for the public," etc.* To the average mind that means the Commission may re-arrange the arrival and departure time of trains. It does not mean that the Commission may require the opera-

tion of additional trains. If anyone was attempting to pass an act giving to the Commission the right to compel railroads to put on additional trains, would he use the language above quoted? It would have been so easy to say that the Railroad Commission, on complaint of inadequate passenger facilities, may require every railroad to provide sufficient passenger trains.

That the above interpretation of Section 4849 is correct is shown by the language of the Mississippi Supreme Court in the case of *G. & S. I. R. R. vs. Railroad Commission of Mississippi, supra.* That case was not only fully considered, but it was re-argued. The court in that case said, with reference to the meaning of Section 4849:

> "It is contended on behalf of the appellee that section 4849 of the Code conferred upon the Railroad Commission the authority to make the order in question. This section gives the commission power, among other things, to hear and determine all complaints made of any time schedule. We do not think that the power to hear and to determine complaints of any time schedule is sufficiently broad to give the Railroad Commission the authority which it has assumed in this case. In our opinion the authority to determine complaints made of any time schedule, and to make any change deemed proper therein, as provided in said section, conferred upon the commission authority only to regulate the time at which any train should arrive and depart from any regular stopping place, and cannot be so construed as to confer upon the commission the right to compel a railroad com-

pany to stop a passenger train at a point other than a regular station."

It is, therefore, contended that the claim of the Commission of power under Section 4849 to require the putting on of new trains is not sound. We do not understand that the Commission denies that its order, in effect, requires the establishment of new trains. This is true, because the former trains which were taken off, except 11 and 12, were interstate trains, and the Commission has no right to regulate those. What it did was to order the inauguration of four new state trains in lieu of what were formerly interstate trains, and to order the reinstatement of two state trains.

The only other statute which Appellant claims gives it authority to enter the said orders is Section 4860 of the Code of Mississippi. That Section reads as follows:

"4860. (4306) Sufficient passenger-cars to be provided.—Every railroad shall furnish a sufficient number of passenger-cars to comfortably accommodate and seat its passengers; if any railroad shall fail to do so, the Commission shall entertain the petition of any person cognizant of the facts. When the petition is filed, the railroad shall be duly notified thereof, and, after investigating the case, the Commission shall make and certify to the railroad such orders as to the number and character of passenger-coaches necessary for the public convenience as the Commission shall deem proper; and in any proceeding concerning the matter, such order of

the Commission shall be deemed prima facie reasonable and proper."

It requires no argument to show that Section 4860 of the Code does not authorize the Commission to require the putting on of new trains. It only gives the Commission the right to require the railroad to "furnish a sufficient number of passenger-cars to comfortably accommodate and seat its passengers". If the Commission's order had directed this Company to put additional coaches on trains it had already established, the Commission could point to the above Section 4860, and if it be shown that there are not sufficient passengers cars on the trains now operated to comfortably accommodate the passengers there will be no denial of authority in the Commission to enter an order with respect thereto.

It is true that the Commission has the power, reasonably exercised, to determine a complaint based on the unnecessary inconvenience of a time schedule, and also that the Commission has the power, reasonably exercised, to entertain the petition of any person based on the failure of the Railroad to furnish a sufficient number of passenger-cars. Appellant says "it is immaterial whether the Company can operate one train so as to make all these schedules required by the Commission or whether it shall operate different trains."

It may be immaterial to the Commission, but it is not to the Railroad Company. If what appellant says is correct then there is no difference as a matter of law between the Commission saying to the

Railroad Company "You have two trains each way daily and they operate between points in Mississippi on an inconvenient schedule, change your schedule", and the Commission saying "You have in operation on your line certain trains and they are operated on a convenient schedule, but the Commission orders that you put on six new trains."

We submit that Section 4860, coupled with Section 4849, clearly shows that the Legislature authorized the Commission to regulate the service given and did not authorize it to require new train service.

In certain states the authority to enter such an order has been upheld because of the general power of regulation given the Commission of those states by the Laws of those states, but in this case we are precluded from any argument that there is any such general power given the Commission because of the language of the Supreme Court of Mississippi in the *G. & S. I. R. R. case,* above quoted, in which the Court says:

> "It may be stated in this connection that we have no general statute submitting to the Railroad Commission general supervision over railroad companies, as will be found in some states; and while general power is given the commission to do many things, however, in each instance it will be found that the power is specifically granted."

It is not legal to broaden the language of such a statute as this. The Commission, having only the

power delegated to it, must be able to point out, without a doubt, the statute giving it the power. If there is doubt it has not the power.

In the case of *Siler v. L. & N. R. R. Co.*, 213 U. S., 175, there was a bill filed by the L. & N. R. R. Co., contending that the order of the Kentucky Commission, prescribing maximum rates on the transportation of all commodities, was violative of the Constitution of the United States. The contention was also made by the Railroad Company that the Commission had no power to make the order in question under a proper construction of the state statute.

On the question of whether the Commission had the power to make the order, the Court said:

> "The Commission, as an extraordinary tribunal of the State, must have the power herein exercised conferred by a statute in language free from doubt. The power is not to be taken by implication; it must be given by language which admits of no other reasonable construction." 213 U. S. 194.

Aside from the lack of power to enter the orders referred to, if it be conceded, for argument sake only, that Section 4849 gave the Commission of Mississippi power to order Appellee to install said six trains, the said orders are not legal, because Section 4849 provided:

> "The Commission shall docket, hear and determine all complaints made of any time schedule * * * The complaint must be in writing and specify the grounds of complaint or the

items in the tariff against which complaint is made; and if it appear to the Commission that the matter ought to be investigated the Commission shall forthwith furnish to the railroad a copy of the complaint, together with notice of the time and place of hearing, etc."

In this case the Commission, as appears from the citation made a part of the bill, (Rec. pp. 14-15), of its own motion cited Appellee to show cause why it should not be required to continue local passenger trains known as numbers 7, 8, 9, 10, 11 and 12.

Appellant in answer to the point of no complaint, set forth Section 4833 and 4834 (App. Bf. p. 6). Section 4833 provides that railroads shall take notice of the time of making the returns and reports required by law, and must be given ten days' notice of the time and place at which any revision of its tariff charges, or complaint concerning the same, will be considered. In all cases of complaint against a railroad the Commission shall give the party complained of reasonable notice but not less than five days. This would give ground for contending that the revision, of tariff charges might be taken up without complaint, but emphasizes the point that in other matters there must be a written complaint.

Section 4834 provides how notice may be given to a railroad by depositing the same in the post office, etc. Appellant contends that the notice under the section cited was sufficient. Appellee did not and does not contend that there was any defect due to lack of proper service of notice. The point is that

if Appellant relied upon Section 4849, then there had to be a complaint and the complaint had to be in writing and had to specify the grounds of complaint, and it was the duty of the Commission to furnish to the Railroad a copy of the complaint. The point made in the lower court and here is that there was no complaint, and that if there was the Railroad Company received no copy of it, and hence the order issued was void and to enforce it was contrary to the rights of Appellee.

Appellant refers, on Page 7 of its brief, to the case of I. C. R. R. Co. v. Dodd, 61 Sou. 743, as an authority to sustain the statement made that the notice, under the Section cited, is sufficient. While there is no point made as to the insufficiency of the notice, it may be said in passing that the case referred to in 61 Sou. holds that the Supreme Court of Mississippi is, by the Constitution of that State, constituted a court of appeals, and that the Mississippi Commission is only an administrative agency and cannot render a judicial decision, and therefore that Section of the Mississippi Laws which gives a direct appeal to the Supreme Court of Mississippi is invalid.

The Legislature of Mississippi has not by general statute required of Railroads the operation of any given number of trains. The Law of Mississippi which constitutes the charter of the Alabama Corporation in that State, does not require the operation of trains in any particular manner.

The interlocutory injunction was properly granted because the Commission, a Board of limited authority, is not authorized under the laws of Mississippi to enter the orders it made in this case, and to enforce an order for which there is no legal authority under the laws of Mississippi amounts to denying to this plaintiff the equal protection of the laws and to a taking of this Company's property without due process of law, contrary to the constitution of the United States.

The Court below passed upon the validity of the orders of the Commission, as entered, and if the Commission was without authority to enter the orders complained of the Court could not, of its own motion substitute any relief that might have been granted.

IV.

The Orders of the Commission Deprive the Railroad Company of its Property without Due Process of Law.

The orders deprive Appellee of its property without due process of law in that they compel the operation of six trains no one of which pays the full cost of operation.

The service rendered is a part of the rate. If it is illegal to lower the rate and thus take the property of the carrier it must be illegal to maintain the rate and require such additional service as would take the property of the carrier. The loss to the Appellee is the same whether the Mississippi Commis-

sion enters an order requiring it to charge one cent a mile per passenger which will result in a loss of $10,000.00 per month, or enters an order that the carrier continue to charge three cents a mile but must run trains every hour in the day at a loss of $10,000.00 per month. We are unable to draw any proper legal distinction between being required to operate an additional train service at a loss and being required to charge an unremunerative rate. This view of this case is stated because most of the cases dealt with by this Court have been rate cases.

Among the first cases construing the due process clause of the Constitution was one in which this Appellee was a party, the case being known as *The Railroad Commission Case,* 116 U. S. p. 307. The Court in that case, at p. 331, said:

> "This power to regulate is not a power to destroy, a limitation is not the equivalent of confiscation. Under pretence of regulating fares and freight, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law."

In the case of *St. L. & S. F. Ry. vs. Gill,* 156 U. S., 649, at p. 657, the Court said:

> "This court has declared, in several cases, that there is a remedy in the court for relief against legislation establishing a tariff of rates which is so unreasonable as to practically des-

troy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

The court then cited a number of cases.

In the *Minnesota Rate Cases,* 230 U. S. 352, at p. 433, the Court said:

"Here we have a general schedule of rates, involving the profitableness of the intrastate operations of the carrier taken as a whole, and the inquiry is whether the State has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the laws."

"The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public." Quoting many decisions.

The Court in the above case in 230 U. S. summarized what the carrier was entitled to in the following language, at page 434:

> "The basis of calculation is the 'fair value of the property' used for the convenience of the public. Smyth vs. Ames, supra, (p. 546). Or, as it was put in San Diego Land & Town Co. vs. National City, supra, (p. 757), 'What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public', See also San Diego Land & Town Co. vs. Jasper, supra; Wilcox vs. Consolidated Gas Co., supra."

The rule for determining whether an intrastate business affords a fair return is well settled by this court, and is as set forth in the *Minnesota Rate Cases,* 230 U. S. 352, at p. 435, as follows:

> "Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the Smyth Case (ib., p. 541). The reason, as there stated, is that the State cannot justify unreasonably low rates for domestic transportation considered alone, upon the ground that the carrier is earning large profits on its interstate business, and on the other hand, the carrier cannot justify unreasonably high rates on domestic business because

only in that way is it able to meet losses on its interstate business."

It is submitted with respect to the rule, that it only becomes necessary to ascertain the value of the property employed in either intra or interstate business, in order to determine what is a fair return thereon or whether the carrier receives just compensation, when the rate or service ordered by the Commission pays something more than the cost thereof. In other words, if the showing is that these trains did not pay the cost of operation it is manifestly immaterial what sum is to be taken as the investment upon which you are entitled to earn a fair return there being no return at all.

The uncontradicted evidence on this point is, that the cost per passenger train mile of operating these trains was approximately one dollar. (Rec. pp. 60, 72, 115). The earnings of trains 7, 8, 9, 10, 11 and 12 for the months of July, August and September, 1914, showed a revenue per train mile for July sixty-five cents, for August sixty-four cents, for September fifty-six cents. (Rev. p. 68). This revenue per train mile was not shown as to said trains for the State of Mississippi as separated from the other states into which they ran for the reason that said trains had not theretofore been operated solely within the State of Mississippi, and the revenues had been kept by trains. For the first five days in October, 1914, during which period trains 7, 8, 9 and 10 were run, the passenger revenue per train mile of those trains between Meridian, Mississippi,

and Waynesboro, Mississippi, the points between which the orders required them to operate, was thirty-six cents. The passenger revenue per train mile of trains 11 and 12 for the first five days of October, 1914, between Meridian, Mississippi, and Okolona, Mississippi, was twenty-five cents. (Rec. p. 71). The Chairman of the Mississippi R. R. Commission stated "I think one train would earn more than forty cents per train mile, yes sir." (Rec. p. 129). The actual out-of-pocket cost of operating said trains 7, 8, 9, and 10, between Meridian, Mississippi, and Waynesboro, Mississippi was 36.3c per train mile (Rec. p. 66). Appellant's witnesses placed this direct cost at 25.54c per train mile. Out-of pocket cost is defined by witnesses to mean the pay of employees on the train and fuel and supplies used on the train. It does not include any maintenance of way and structures or the wear and tear on the track or buildings; does not include the repair of the equipment used in said trains or any portion of the cost of dispatching said trains, or any portion of the wages of station employes or any charge for damage to live stock, or any proportion of traffic or general expenses, or advertising, etc., with all of which it should be charged its pro-rata. (Rec. p. 67). The General Manager of the Railroad Company testified:

> "This Company would have been justified, according to the earnings of these trains, in taking them off prior to the general business depression felt by this Company along with other business generally, because we gave the

trains a fair and honest trial for many months and they did not pay." (Rec. p. 61).

"These trains were not taken off to make up any loss being sustained on the business of the Company as a whole. They were taken off because they did not themselves pay the cost of operation and because, due to the falling off of the business of the Company as a whole, there was no general revenue out of which this Company could, during the depression, make up the deficit of these trains as it has in the past." (Rec. pp. 61-2).

The correctness of the rule as set forth in the above referred to decisions of this court being beyond dispute, and the Assistant Attorney General, seeming to recognize that a showing had been made that the individual trains did not pay anything over the cost of operation, (when all the items properly chargeable to the trains are taken into consideration), states the law applicable to this case to be:

"None of the reasons set forth for refusal to operate the said trains, or for an injunction thereon, will prevent the facility being required unless it can be shown that the intrastate business done by the Company within the State of Mississippi, taken as a whole, amounts to such a loss as would constitute a taking of property without due process of law." (App. Brief p. 26).

The question then arises as to whether a showing is made by Appellee of a taking of its property without due process of law on proof of loss in reve-

nue from the operation of each of the trains, or is it necessary for Appellee to also show that its business, taken as a whole, in the State of Mississippi, amounts to such a loss as would be confiscation.

It is submitted that the showing of loss due to the operation of these trains is all sufficient. In support of this we refer to the following cases:

Interstate Commerce Commission v. Union Pacific Railroad Co., 222 U. S. 541.

The Court said in that case, at pp. 546 and 549:

> "These appeals raise the single question as to whether, making the 45c rate, the Commission acted within or beyond its power."

The Court in discussing the question of the reasonableness, said:

> "Where the rates as a whole are under consideration, there is a possibility of deciding with more or less certainty, whether the total earnings offer a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on the particular article is reasonable, *For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article.*" (Italics the writer's).

The Court also said in discussing the question as to the effect to be given to the orders of the Interstate Commission:

> "A question of fact may be involved in the determination of questions of law, so that an order regular on its face may be set aside if it appears that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against the taking of property without due process of law, etc., Ib 547".

In the case of *Southern Railway Company vs. St. Louis Hay & Grain Company,* 214 U. S. 297, there was involved the validity of a charge per car made by the Railroad Company for the privilege of reconsigning. The Commission held the charge unreasonable. The Lower Court sustained the Commission. The Railroad appealed to the Supreme Court, which Court in discussing the validity of the Commission's order, said:

> "We are unable to concur with the commission. If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this

> true when as here, the privilege is in no sense a part of the transportation, but outside thereof. Whether the conclusion of the commission that the carrier is under no obligations to permit the interruption of the transit is right, and whether it is or is not under such obligation, it is entitled to receive some compensation beyond the mere cost for that which it does." Ib. 301.

It seems clear that the fact that the freight business in the State of Mississippi was conducted at a profit would furnish no sound reason why the Railroad Company should install additional passenger train service. Otherwise the shippers of freight would be paying not only the cost of carrying their freight and a reasonable profit thereon, but also making up the deficit in the operation of passenger trains.

It is certainly the general rule, as set forth by this Court in the above referred to cases, that a carrier is entitled to receive some compensation beyond the mere cost of that which it does. There are, it is true, certain sentences in some of the decisions of this Court which, if not read in connection with the facts of the case being decided, do appear, superficially, to be in conflict with the general rule above set forth. It is submitted that those cases do not really conflict. None of these cases sustain the proposition of Appellant that in such a case as this it is necessary for Appellee to show that its intrastate Mississippi business, "taken as a whole, amounts to such a loss as would constitute a taking of property without due process of law." What these cases

hold is that in considering the installation of a small physical facility, considered a primal duty, where the expense to the carrier is, comparatively speaking, small or trivial when weighed against a great public interest or a public convenience to many people then this Court will not interfere, and hold that such small expense or proof that some loss would result thereby in and of itself and by itself amounts to a taking of property without due process of law, provided the carrier is able to earn a fair return upon its entire business.

We now discuss such of those cases as we have found and distinguish each from the case at hand:

The first of these cases that we have found is that of *Wisconsin, etc., R. Co., vs. Jacobson,* 179 U. S 287.

This was a case which went to the Supreme Court by writ of error from the Supreme Court of Minnesota, to review the judgment of that court, affirming the judgment of the District Court directing plaintiff in error and a certain other railroad company to make track connections. The case began by Jacobson filing his petition before the Railroad Commission of the State under a law of Minnesota which required track connections. The railroad defended on the ground that to compel it to make the connection would violate the Constitution of the United States. The Court said:

"At common law the courts would be with-

out power to make such an order as was made in this case by the state court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind. If power were granted by the legislature, and it amounted in the particular case *simply to a fair, reasonable and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and of the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it.* (Italics the writer's). Atchison &c Railroad Company vs. Denver &c Railroad Company, 110 U. S. 667, 681. People ex rel &c. vs. Boston & Albany Railroad Company, 70 N. Y. 569. People vs. Railroad Company, 104 N. Y. 58. p. 296."

The Court further said:

"Taking the facts which we have already enumerated into consideration we think there is no justification furnished for the argument that the judgment, if enforced violates any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute or a regulation provid-

ed for therein, is frequently valid, or the reverse according, as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action." p. 301.

The Court also said:

"Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error." p. 302.

The above case involved a small expense of construction of a connecting track, and there does not appear to have been any claim on the part of the Railroad Company that this mere cost of construction would take its property, or that it was not earning a fair return on its whole property. The difference between this case and the one at bar is striking. In the Jacobson case the Court was enforcing a State statute requiring track connections between railroads, and the Court said the Railroad Company could not refuse "upon the sole ground that it may thereby *somewhat lessen* (Italics the writer's) the earnings of its road. Or can it refuse to make such connections because, if they were made, wood could be brought from the forests of northern Minnesota to all towns along its line west of Hanley Falls, and there sold for a less price than

can now be done, when without such connection being made the demand for the wood along the line of the road of the plaintiff in error is nevertheless constantly decreasing owing to its quality and price." There is not stated in the report of the case any facts showing that the construction of the track would itself take the property of the railroad, or that any emergency or crises existed in the matter of the earnings and expenses of the Railroad Company.

The next case is *Minneapolis vs. St. Louis R. Co.* 186 U. S. 257:

This was a petition for a mandamus filed in the District Court of Ramsey County by the State, upon the relation of the Railroad and Warehouse Commission, against the Minneapolis and St. Louis Railroad Company and several other railroad companies, (the first of which alone answered and sued out this writ of error,) to compel such companies to adopt and publish a joint through rate fixed by the Commission upon shipments of hard coal in carload lots, from the city of Duluth to certain points in the southern and western parts of the State of Minnesota, and to enjoin them from demanding or receiving any greater sum for such through shipments than that fixed by the Commission. It will be noted that the rate involved was a joint through rate on hard coal.

The second question raised was whether the tariff fixed by the Commission was wholly inade-

quate and not compensatory. In discussing the testimony the court said at p. 265:

> "This rate, fixed by the Commission only upon hard coal in carload lots, was not met by any showing that at the rates fixed by the Commission there would be no profit or an insufficient profit upon the coal so transported, etc."

At p. 266:

> "It is quite evident that this testimony has but a slight, if any, tendency to show that even at the rates fixed by the Commission there would not still be a reasonable profit upon coal so carried. It was not even shown that the joint tariff fixed by the roads themselves upon coal was not disproportionately high as compared with rates upon other articles or as gauged by a proper classification. The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots, and that even in proving that the cost of transporting *all* merchandise exceeded the rate fixed by the Commission on this coal, the interest upon bonds and dividends upon stock were included in operating expenses. The propriety of the first is at least doubtful, the impropriety of the second is plain. *We do not intend, however, to intimate that the road is not entitled to something more than operating expenses.* (Italics the writer's). It was shown that coal belongs to one of the lowest classes of freight, and this is particularly true of the coal received from Duluth at Minneapolis, which was delivered at the Minneapolis and St. Louis Company upon their tracks at Minneapolis. Besides this, coal in carload lots was a

comparatively insignificant item of the total freight carried, being but 2583 tons for an entire year."

The Court in its opinion said that the rates upon other merchandise which are not disturbed by the Commission might be sufficient to earn a large profit to the Company, though it may earn little or nothing upon coal in carload lots; also that to meet competition from other roads the companies themselves might fix a disproportionately low rate upon certain classes of freight. It then held that the right to permit this to be done was in the Interstate Commerce Commission, and that the Courts had never decided that the Commission might compel such reductions.

The Court then said:

"We do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular."

It also said:

"Each case must be determined by its own considerations, and while the rule stated in Smyth vs. Ames is undoubtedly sound as a general proposition that the railways are entitled to a fair return upon the capital invested, it might not justify them in charging an exorbi-

tant mileage in order to pay operating expenses, if the conditions of the country did not permit it."

The holding was that the action of the Commission in fixing the rate complained of was not shown to be so unreasonable as to amount to a taking of property without due process of law. It was not held that if the showing was clear that the rate on coal did not pay the cost of operation that such rate would not be confiscatory; on the contrary the court took pains to point out wherein the evidence failed to show that there would be no profit or an insufficient profit. Attention is directed here to the insignificant item of freight that was involved and to the fact that the court said that it was not beyond the power of the Commission to *reduce* the freight upon a particular article provided the companies are able to earn a fair profit upon their entire business. These facts are sufficient to distinguish that case from the one at bar.

The next case is that of *Atlantic Coast Line vs. North Carolina,* 206 U. S. 6.

That case involved an order of the North Carolina Corporation Commission, which directed the Coast Line to run a train to make connection with a certain train on the Southern Railway. The connection was testified to be a very important connection. The Commission of North Carolina found in part as follows:

"Considering the operation of an extra train from Rocky Mount to Selma or the exten-

sion of the run of one of the branch trains as directed in the previous order, and the objection that a loss would be entailed in the operating expenses for such train or trains, the Commission treated that fact as immaterial, because it found as a matter of fact that the total receipts of the Coast Line in North Carolina, taken from business in that State, were sufficiently remunerative, and therefore that even if the train was operated at a loss, as that loss would not reduce the total earnings below what was an adequate remuneration for the whole business, the order would not take the property of the road without due process of law." p. 16.

When the case was before the Superior County Court of North Carolina one of the findings of fact was that it would cost $40.00 per day to operate the train, and that its receipts would be $25.00. On appeal to the Supreme Court of North Carolina that court, in reviewing the means of performance of the order requiring a connection at Selma, held:

"In doing so it was decided that although to execute the order of the Commission it might be imperative for the Coast Line to operate at a pecuniary loss a new train from Rocky Mount to Selma, or the extension with like result of the movement of one or the other of the branch trains from Rocky Mount to Selma, no violation of any right of the Coast Line protected by the Constitution of the United States or of the State would arise. This was based upon the finding by the court that the average net earning of the railroad from its business in North Carolina was of such a character that an adequate remun-

eration would remain after allowing for any possible loss which might arise from operating either of the trains in question. 137 N. Car. 14." p. 19.

Attention is directed here to the fact that the average net earnings of the Railroad from its business in North Carolina was of such a character that an adequate remuneration would remain after allowing for the loss on this train. This Court said:

"As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantee and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted.

In coming to consider the question just stated it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertain whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as in substance

and effect to exceed regulation, and be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws." (p. 20).

One of the important facts mentioned by this Court was:

"In considering the facts found below as to the connection in question, that is, the population contained in the large territory whose convenience was subserved by the connection, and the admission of the railroad as to the importance of the connection, we conclude that the order in question, considered from the point of view of the requirements of the public interest, was one coming clearly within the scope of the power to enforce just and reasonable regulations." p. 22.

The Court also said:

"Conceding, as must be done, that the nature and extent of the existing facilities furnished by a carrier for the public convenience are essential to be considered in determining whether an order directing an increase of such facilities is just and reasonable, and that the deficiency of facilities must clearly appear to justify an order directing the furnishing of new and additional facilities, we think the proposition here relied on to be without merit." pp. 22 and 23.

The Court then said:

"The contention is that the fact that some

loss would result from the requirement that the extra train be operated, in and of itself, conclusively establishes the unreasonableness of the order and demonstrates that to give it effect would constitute a taking of property without due process of law in violation of the Fourteenth Amendment."

The Court quoted with approval the doctrine of Smyth vs. Ames, and then said:

"But this case does not involve the enforcement by a State of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety. The difference between the two cases is illustrated in St. Louis &c. Ry. Co. vs. Gill, 156 U. S. 649, and Minneapolis & St. Louis R. R. Co. vs. Minnesota, 186 U. S. 257. But even if the rule applicable to an entire rate scheme were to be here applied, as the findings made below as to the net earnings constrain us to conclude that adequate remun-

eration would result from the general operation of the rates in force, even allowing for any loss occasioned by the running of the extra train in question, it follows that the order would not be unreasonable, even if tested by the doctrine announced in Smyth vs. Ames and kindred cases." pp. 24 and 25.

The Court said that the case in hand "concerns solely an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience."

The Court said further:

"The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of Smyth vs. Ames or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary fa-

cilities is cotermious with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." pp. 26 and 27.

In the *Coast Line Case* there was a conceded necessity for the connection, here there is absolute denial of necessity; in that case there was no showing or claim that the Coast Line was not making money on its business as an entirety, here the proof is quite the contrary, in that case the court constantly referred to the "incidental pecuniary loss," here it is great and direct. The instant case might be parallel if during normal times when Appellee was earning a reasonable general revenue, Appellee had been ordered to operate one train the necessity for which had been admitted.

The basic fact of that decision is that adequate remuneration would result from the general operation, and there was no showing of general emergency in the operations and finances of the Railroad Co.

The next case was that of *Missouri Pacific vs. Kansas,* 216 U. S., 262.

That was a case involving an order commanding Missouri Pacific Ry. to obey an order of the State Railroad Commission to put in operation a passenger train service between the Missouri-Kansas line and Madison, Kansas. The facts were that the

Railway ran a mixed train on the Madison Branch, and the order directed it to run a separate passenger train. One of the contentions of the Railway was that the order was confiscatory. The Court referred to the Atlantic Coast Line case, and quoted from it certain of the portions that are above quoted. In dealing with the question of whether the service should be ordered, notwithstanding it would cause a pecuniary loss, the Court referred to the insistence of the Railway that it was a case not only of proof that pecuniary loss would be occasioned by performing the particular service, but also of proof that the earnings from all sources produced no net revenue. The Court then said that this contention challenged the correctness of the inference of fact drawn by the court below, and required the Supreme Court to give an independent examination of the facts. It then decided that it was not necessary to give an independent examination, and held:

> "We say this because, when the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist." pp. 277 and 278.

The Court also held:

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights those rights not having been surrendered by the corporation, other considerations are in the nature of things paramount, since it cannot be said that an order compelling the performance of such duty at a pecuniary loss is unreasonable." p. 279.

The Court then held that it was a part of the duty of that Company on its road to run a train for passenger service and that a mixed train would not be compliance therewith.

In the above case the duty was a primal one, that of operating a passenger service, and did not involve the question of the operation of *additional* passenger trains; in addition the Court did not consider the disputed fact as to pecuniary loss.

The case of *Northern Pacific Railway vs. North Dakota*, 216 U. S. 579, was a proceeding by the Attorney General of North Dakota, charging the Northern Pacific Railway with violation of a law fixing rates for the carriage of coal within the State, and asking for an injunction. The Railroad Company answered that the act was void under the Fourteenth Amendment, because the maximum rates fixed were inadequate and confiscatory. The Supreme Court of North Dakota decided that the injunction should issue enjoining the Railroad Company from continu-

ing to violate the rate on coal. The Supreme Court of the United States said:

> "The grounds of its decision were that the act referred only to transportation wholly within the State and therefore was not bad under Art. I, Paragraph 8, thus removing that question; and that the evidence did not prove that the rates would entail a loss on the carriage of coal, so that it was not necessary to decide whether in that event it would be unconstitutional, if the railroad made a fair profit on its whole business within the State.
>
> The court did, however, intimate its opinion that if the railroad was able to make a fair profit upon its whole business within the State it might be required to carry a particular commodity at cost or possibly below, and it expressed its opinion so strongly that the counsel for the plaintiff in error treats that doctrine as the ground of decision and the statement as to the insufficiency of the evidence as made only in the light of it and upon rather technical grounds. He argues that the evidence was undisputed, that the facts testified to and the fair inferences from them must be taken as proved, and that on those facts and inferences the constitutional question is raised. The evidence consisted of tables of rates in other States, computation as to the cost of transportation, and expert opinions, all of which were thought to converge to the conclusion that the statutory rates were unreasonable and less than the cost of carriage. But laying technical objections on one side and taking the facts as admitted, the argument for the State showed that there are too many elements of uncertainty in the calculation for us to say,

if we could, as to which we intimate no opinion, that the conclusion is proved, when the Supreme Court of the State says that it is not. The carriage of coal is a very small part of the railroad's business. The estimate of the cost is admitted to be uncertain, and to depend in part upon arbitrary postulates. It has to be increased considerably above the average cost for freight in order to make out the plaintiff in error's point. We are far from saying that the argument for doing so does not seem to us to have considerable probability on its side. We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law. But we can express no opinion upon it now. The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of Wilcox vs. Consolidated Gas Co., 212 U. S. 19, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Attention is called to this case because there was involved in it the rates on one particular commodity, and, as will be seen, the state court had intimated that if a railroad made a fair profit upon its whole business it might be required to carry a

particular commodity at cost, or possibly below. The Supreme Court said that the carriage of coal was a small part of the Railroad Company's business. The Supreme Court affirmed the lower court's decision, on the ground that the rates should be given a trial and said that the experiment might establish a case for the Railroad Company, and that the Railroad Company might reopen the case if, after adequate trial, "it thinks it can prove more clearly than at present the confiscatory character of the rates for coal," which amounted to *not* following counsel's suggestion that the service on one article might be required even at a loss.

In the case of *Missouri Pacific Ry. vs. Tucker,* 230 U. S. 340, there is involved the constitutionality under the Fourteenth Amendment of the statute of 1905, of the State of Kansas establishing maximum rates for transportation of oil, gasoline, etc., which fixed five hundred dollars as liquidated damages for violations of the Act. The Attorney General in his brief (p. 343), referred to the case of McCue vs. Northern Pacific above quoted, also to the Atlantic Coast Line case in 206 U. S., and the Missouri case in 216 U. S. to sustain the point that a road might be compelled to do certain acts at a positive loss.

The Supreme Court in its opinion, said:

> "In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it

is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal."

The Supreme Court did not deal with the question of whether the rates were reasonable or not, but reversed the case because the damages fixed deprived the carrier of its property without due process of law.

In the case of *Missouri Pacific Ry vs. Nebraska*, 217 U. S., 196, there was involved the constitutionality of the statute of Nebraska requiring railroad companies to make switch connections with grain elevators under certain conditions. The railroad contended that the statute was void under the Fourteenth Amendment. In the Attorney General's brief (pp. 203-4), the Coast Line case was quoted to sustain a statement that a railroad might be required to furnish facilities to accommodate the public though it suffer loss thereby.

The Supreme Court said:

"Now it is true that railroads can be required to fulfill the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. Misssouri Pacific Railway Co. vs. Kansas, 216 U. S. 262. It also is true that the States have power to modify and cut

> down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away." p. 206.

The Court held that the statute was unconstitutional because it did not provide indemnity for what it required, and did not decide anything else.

Attention is directed to the quotation above given in the last case cited. That case holds, in effect that a railroad may be required to fulfill the purpose for which it is chartered, and to do what is reasonably necessary to serve the public even to the performance of some part of their duties that does not pay. The Court referred to the *Kansas case* in 216 U. S. because that was a case of an attempt by a railroad to abandon the operation of all passenger trains.

Then the Court said:

> "But railroads after all are property protected by the Constitution and there are constitutional limits to what can be required of their owners under either police power or any other ostensible justification for taking such property away." p. 206.

The other ostensible justification referred to

is that primal duty to the public referred to in the *Kansas* case and in the *Coast Line* case.

These are all of the cases that we have found which might tend to sustain a contention that the law requires Plaintiff to operate the said six trains, notwithstanding the fact that the operation of said trains would cause heavy pecuniary loss to Appellee at a time of great business emergency when its receipts from its entire business was falling off at the rate of $10,000.00 per day and when it had no general revenue from which to make up the deficit caused by the operation of said six trains, and when in the opinion of its management to be compelled to operate said trains would jeopardize its existence. It is submitted that none of these cases go to this extent; and if the Coast Line case had been submitted on facts similar to the uncontradicted record in this case the decision would not have been the same.

Appellee does not seek to enjoin one rate, or the operation of one train. The orders require the operation of six trains daily, and are in scope more similar to a whole rate schedule than a single rate.

If in 1909 when the Mobile & Ohio Railroad Company put on the first of these trains, there had been an order entered by the Commission requiring said train to be put on, and there had been admitted a necessity therefor, and the general business of the Company had been profitable or could stand the loss caused by that train, then the facts would have been somewhat similar to those in the Coast Line Case. The facts to-day are dissimilar. We have failed to find any case which would require the op-

eration of additional passenger trains if to do so would cause loss, and if there was no general revenue from the entire business out of which the loss could be paid. Why does the Court in all of these cases refer to the fact that the business generally was remunerative? It was because the court would not sustain any order which would be such a burden upon the revenue as to cause ruin to the Railroad Company. If ruin was brought upon the Railroad Company, the order of the Court would have this practical result: It would secure for a time to a certain few patrons of the Company additional facilities, and in doing so would deprive the public generally, as well as these few, of the whole facilities when the loss would cause the operations of the entire road to cease.

Appellee operates its interstate railroad as an entirety. It has but one treasury, and a default in payment of interest on its mortgages and consequent foreclosure thereof would occur from lack of funds in that treasury, and, therefore, the management looked to that one treasury to ascertain if it was necessary to make the retrenchments it made, and if the retrenchment program made necessary was, as shown, made without discrimination against any locality or any State, then the loss in the entire business was the proper element to be considered. As a practical matter the loss in revenue of Appellee was due, as shown by the testimony, to the demoralization of the cotton and lumber markets, the principal producing territory of which on the line of the Mobile & Ohio Railroad was in Mississippi.

These decisions, particularly the Coast Line Case, fully justify the granting of the injunction asked in this case. The Coast Line Case is an authority for the relief sought here. That case holds that the fact that the furnishing of the facility ordered may occasion an incidental loss is an *important* criterion to be taken into view. It also referred several times to the conceded fact that the Coast Line was making money on its business as an entirety, and emphasizes the fact "that the deficiency of facilities must clearly appear to justify an order directing the furnishing of new and additional facilities."

The utmost that can be claimed for these decisions is that they hold that the showing of incidental pecuniary loss is not, standing alone, sufficient justification for the refusal to perform a primal duty. These decisions do not hold that there is any justification, in law, for an order requiring the operation of additional passenger service at an admitted loss when the entire business is falling off to a very marked degree and the actual cash situation was critical, and when the continued operation of the entire business will be jeopardized by the loss occasioned by the additional facility, and when by all the best tests of public need there is no necessity for the additional facilities. Where a road ceases to operate *any* passenger trains, it is clearly abandoning a primal duty. It is, however, it seems to us, a

stretching of the meaning of primal duty to hold that the putting on of an additional passenger train comes within that term, except possibly where the necessity therefor is admitted.

Appellant in its brief from page 12 to the middle of page 26 cites numerous authorities to show that a state may, by proper enactment *not forbidden by its own or the Federal Constitution,* regulate corporations within its jurisdiction, and to show that such legislation, subject to the condition that it be *not* inconsistent with the National Constitution, may be with reference to the public convenience as well as with reference to public health, public morals or public safety. The decisions of this court so hold, and Appellee does not dispute said general rule or attempt to answer said portions of Appellant's brief. We contend that if the Commission in this case had the power to pass the orders, said orders, under the circumstances of this case, *are forbidden by the Federal Constitution.*

As to the statement that the reasonableness of the schedule or convenience cannot be determined until the carrier has made a test showing that there is an actual loss, it is submitted that the proof is that said trains have been in operation for periods of from four years to eighteen months and that no one of them has at any time since it was inaugurated paid its total cost of operation.

V.

Do The Orders Directly Interfere With Interstate Commerce?

This railroad in Mississippi is a part of an interstate railroad running through the states of Alabama, Mississippi, Tennessee, Kentucky and Illinois, and into Missouri. This interstate road has one management, one set of obligations, one Treasury out of which to meet said obligations, one railroad and facilities to operate to earn money. There is no denial of the right of the State to control the property within the state in its relation to domestic matters. It is the duty of the constituted authorities of Mississippi to prevent discrimination in intra-state matters against persons and places in Mississippi. The right to prevent discrimination against Mississippi does not confer upon Mississippi the right by order of the Commission to require a preference in service to Mississippi over other states served. Mississippi could not pass a valid law requiring all the freight cars owned by the Railroad Company to be brought into the State and used between points in Mississippi. The duty of the Company is owed to several sovereignties, and is also owed to the general government.

It is manifest that action on the part of one state should not stand if it was so unreasonable as to prevent the performance of the general duty or if it were so unreasonable as not to force the line to

cease operating but to place a burden upon the general operation or the operation in other states. The courts hold in all cases that a railroad Company cannot justify an unreasonably high rate on domestic business because only in that way is it able to meet losses on its interstate business, per contra, the State cannot justify unreasonably low rates for domestic transportation upon the ground that the carrier is earning large profits on its interstate business. In this case, the attempt is to justify a train service, notwithstanding it is in and of itself a losing proposition. The loss must be made up out of the general revenue which does not exist. The bill in this case contains an averment that under the circumstances the earnings of the Company will not stand a loss and that to force it to continue the operation at a loss will jeopardize its whole operations. If it will, there cannot be a more direct interference with interstate commerce or a greater burden put upon it. Certainly to destroy the ability to operate as an interstate carrier is a greater blow at interstate commerce than to merely interfere with it. The state cannot physically build a wall across the track and prevent the operation of interstate trains. If it cannot do that, it should not be allowed to prey upon the revenue of the Company to such an extent as to make it impossible for the trains to run.

In the *Minnesota rate case,* 230 U. S. p. 401, the Court said:

> "They (the States) have no power to prescribe the rates to be charged for transporta-

tion from one state to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection."

A number of cases have been decided by the Supreme Court of the United States touching the validity of orders of the State Railroad Commission directing the stopping of through interstate trains. In the case of *Atlantic Coast Line vs. Wharton,* 207 U. S. 328 at p. 334, the Court says:

"That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious. * * * * * * When, therefore, an order made under state authority to stop an interstate train is assailed because of its repugnancy, to the interstate commerce clause, the question, whether such order is void as a direct regulation of such commerce may be tested by considering the nature of the order, the character of the interstate commerce train to which it applies, and its necessary and direct effect upon the operation of such train. But the effect of the order as a direct regulation of interstate commerce may also be tested by considering the adequacy of the local facilities existing at the station or stations at which the interstate commerce train has been commanded to stop. True, inherently considered, whether there be adequate local facilities is not a Federal question, but insofar as the question of such adequate local facilities is involved in the determination of the Federal

question of whether the order concerning an interstate train does or does not directly regulate interstate commerce, that question for such purpose is open and may be considered by us. 203 U. S., supra." * * * * * * * * *

"The term, 'adequate or reasonable facilities' is not in its nature capable of exact definition. It is a relative expression and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost. * * * That the inhabitants of a place demand greater facilities than they have, is not at all conclusive as to the reasonableness of their demand for something more."

The cases involving the right of a Railroad Commission to order an interstate train to stop differ from this. In this case, the railroad company has made all its interstate trains local trains, stopping at all points in order to accommodate the local traffic. The Railroad Commission, not satisfied with that, orders other trains put on between points within the State of Mississippi. The orders do not, therefore, directly physically burden an interstate train. Our contention is that the orders place a burden upon interstate commerce because the orders require the operation of trains which are not self-sustaining. The result being that in order for the Railroad Company to obey, it must take the money it makes from the operation of its railroad generally

including interstate commerce and supply the deficit, and that this jeopardizes the operation of the whole line and thus constitutes a burden thereon.

As was said by the Court in *M. K. & T. vs. Love,* 177 F. R. 494.

> "It is generally the case, as here, that the railroad is but part of a larger system, extending into or through other states, and there are factors of value, revenue and expenses, which though without the State have such relation to and effect upon those within, that they must be regarded in reaching a just conclusion."

> "It must always be remembered that under the Constitution a railroad cannot lawfully be denied a reasonable return upon its property devoted to public use, and if by the scope of its operations several sovereignties are interested, the special insistence of the officers of one should not be allowed to cast an undue burden on the others."

When the special insistence of a State does cause an undue burden on the others, it is a burden on interstate commerce.

This court in *Railroad Commission Cases,* 116 U. S. 307, at p. 334, after referring to the rule that a corporation is not relieved entirely from state regulation because of incorporation by other states, and after stating that Mississippi could govern this corporation in respect to all things which had not been

placed by the Constitution of the United States within the exclusive jurisdiction of Congress, said:

> "Under this rule nothing can be done by the Government of Mississippi which would operate as a burden on the interstate business of the Company, or impair the usefulness of its facilities for interstate traffic. It is not enough to prevent the State from acting that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within."

VI.

The Orders Interfere With An Instrument Of The U. S. Government.

Section 3964 of the United States Constitution constitutes this Railroad and other railroad post roads. The State has no right to put such a burden upon the road as will destroy its ability to live as a road and continue to serve the Government. If the Legislature of Mississippi were to pass an act requiring this Company to handle free all passengers or all native grown products, and to do so would cause the road to go into bankruptcy followed with the deterioration of its roadbed in such a manner as to destroy its usefulness as an interstate road, the Act would certainly interfere with this railroad made a post road by act of Congress. To require the Railroad to operate trains at a loss is to require

it to furnish some part of the service for nothing. The difference between that and requiring the Railroad to handle passengers free is merely one of degree. The burden is none the less violative of the Constitution, because on the income instead of the physical property. A state cannot tax interstate commerce, or the right to do Governmental business. To require these trains to be operated at a loss is the equivalent of placing a tax equal to the deficit on the general interstate business.

In the case of *Railroad v. Peniston*, 18 *Wallace*, p. 29, 21 Law Ed. 787, the Court, in referring to the charter provisions of the Union Pacific Railroad, said:

> "They all look to a purpose of Congress to secure an Agency competent and under obligation to perform certain offices for the general government."

The Court also expressly declared that the fact that the corporation in the case of Thompson v. Railway Company dealt with a corporation incorporated by the Legislature of the State presented no reason for the application of a rule different from the general rule.

It then said:

> "As was said in *Western v. Charleston*, 2 Peters 466, they, (meaning the States) cannot by taxation or otherwise, retard, impede, bur-

den, or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the General Government'. The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a State legislature."

VII.

Do The Orders Impair The Obligation Of A Contract?

The United States Government granted to the State of Mississippi a large acreage of land to aid in the construction of a railroad from Mobile to a point near the mouth of the Ohio River. The Legislature of Mississippi granted the land to the Mobile & Ohio Railroad Company. Section 4 of the grant by Congress made this Complainant a public highway for the use of the United States Government without charge for the transportation of troops and property of the United States. The Courts hold that a grant of land to the State upon certain conditions and the acceptance of the grant by the State constitute a contract which cannot be violated by the State's legislation. Plaintiff contends that the orders of the Commission jeopardize its existence and its ability to carry out said contract.

In McGehee vs. Mathis, 18 Law Ed. 314, at p. 318, the Court said:

"It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the state, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the state, and could not be violated by its legislation without infringement of the Constitution."

In Pearsall vs. Great Northern Railway Company, 161 U. S. Rep. 646, at pp. 661-665, the Court said:

"Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of a corporate charter such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation. Even before the Darrmouth College case was decided, it was held by this court that grants of land made by the Crown to colonial churches were irrevocable, and that property purchased by, or devised to them prior to the adoption of the Constitution, could not be diverted to other purposes by the States which succeeded to the sovereign power of the colonies." p. 661.

"Nor does it follow, from the fact that the contract evidenced by the charter cannot be impaired, that the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the manner in which the franchises are to be exercised, and which do not interfere substantially with the

> enjoyment of the main object of the grant are not open to the objection of impairing the contract." p. 665.

In *United States v. Union Pacific Railroad Company,* 98 U. S. page 613, the Court, after declaring that the Company had been organized under and owed its corporate existence to the Act of Congress, proceeded to say:

> "The Government, however, holds another very important relation, namely, that of contract. It has loaned to the Company $27,000,000.00 and granted to it on certain terms many million acres of land. The Government is paying all the time a semi-annual interest on its bonds, loaned to the company. The Company is bound by contract to pay them, principal and interest, at their maturity. The Government by the contract has a lien on the road and its appurtenances to secure this payment. The company is also bound by the contract to perform for the government all the transportation and telegraphing that may be required of it, and to keep its road and line always in order and readiness to render these services."

The claim made on behalf of Appellee is that the orders would force it to lose a large sum of money and the result would be a substantial interference with the main object of the grant of the lands by the Government, viz., to operate a post road and carry the United States mail at a reduced price.

VIII.

Is The Present Passenger Service Adequate?

The decisions and text writers say, "the duty of the railroad company to operate its road requires it merely to meet the public wants and exigencies." The best test, if not the only correct method of testing the need of an additional facility, such as a passenger train, is whether or not a sufficient number of people claim the right to use the train, at the statutory rate, to pay the cost of operation and a fair profit.

There is a general duty on the part of railroad companies to receive and carry passengers. That duty existed in 1848, when this railroad was chartered. It could not be claimed that there was any duty in 1848 to run four passenger trains each way each day, because of two facts: the first was that there was no demand on the part of the people for such a number of trains, and the second was that the railroad company was not physically or financially equipped to so operate. The duty to-day is not what it was twenty years ago. It arises and is governed by the volume of business offering. To say that if there were a duty to run four passenger trains that there never could be a lesser duty would be manifest error. Those trains were operated on this road when the finances permitted, even though the volume of traffic did not fully warrant.

The affidavits from all of the towns except Me-

ridian show that those towns do not regard the present facilities inadequate. The affidavits taken by the Commission of citizens of Meridian, Mississippi, show that the business of Meridian would be injured if the trains would be taken off.

There was not, however, at Meridian any unanimous demand for the restoration of the trains under the circumstances of this case. (The affidavit of R. V. Taylor shows the contrary.) Those people who testified that they thought that the service was inadequate, themselves cut down their expenses because of the reduced volume of business.

The State of Mississippi should not be permitted to say to the Railroad Company: "Heretofore you have rendered a certain quality and quantity of service, for which we have paid you a certain amount. Hereafter you must continue to furnish the same quality and quantity of service and we will pay you an amount therefor much less than heretofore." The statement is proof sufficient of the inequity of the proposition.

In a number of cases the Courts have held, with reference to rates that they should be given a test. We are not at variance with that in this case, because the question of whether these trains will pay or not has been tested, in one case five years, and in no case less than eighteen months, and the unimpeached direct statement is made, corroborated by the earnings of the trains, that no one of them has paid.

It must be remembered that the duty owed by the Railroad Company is to the public, and an in-

dividual has no right to demand that a train be run to suit his convenience. The individual secures whatever right he has by virtue of his being one of the public or the community, and the duty to the community does not arise unless a sufficient number of the public demand the right to create it. This is the generally accepted rule.

Adequacy must be viewed from the standpoint not only of the citizen but from the standpoint of the railroad. What is adequate service when there is a great business depression might be inadequate when the finances of the Company would permit an enlargement of the service, without too great sacrifice of its general revenue.

In 12 Gray 180, the test of the question of adequacy or inadequacy of service is dealt with in this language:

> "Mandamus was refused to compel the running of passenger trains over a branch road on which this had been discontinued, after running them for a time, because they were unprofitable. The question is not as to the existence of the duty, but as to the extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains are run at reasonable and moderate fares, and cannot be supported, it is because they are not needed."

The reasonableness of the orders should be a controlling factor. These orders should be enjoined on the ground of unreasonableness.

In *Minneapolis, St. P. & S. S. Marie, Ry. Co. vs. Railroad Commission* of Wisconsin, June 5th,

1908, 17 L. R. A., N. S. 821, 116 N. W. 905, the Court said:

> "In determining whether or not the order of the Commission is unreasonable, it must also be considered that every unnecessary burden imposed upon the railroad impairs its net receipts and diminishes that margin, if there be one, between the amount sufficient to assure a fair return on the value of its property, plus the amount of its fixed charges and operating expenses, and its gross receipts. In this margin the public and the railroad are interested, because it is only when this exists that betterments in construction, or improvements in service not imperative or indispensable, or reduction in rates, will ordinarily be voluntarily made by the railroad, or can ordinarily be ordered or enforced by the commission. We are not now speaking of these extreme cases where the public duty must be discharged, whatever the financial consequences to the railroad. Covington & L. Turnp. Road Co. vs. Sanford, 164 Sup. Ct. Rep. 198, and cases in Rose's Notes; 3 Cook, Corp, 4th ed. Secs. 900, 901, and cases in notes. But, in ordinary cases, to waste this margin is to waste the fund in which the whole public is interested. *This should never be done for the benefit of the few, as against the interests of many.*" 832. (Italics the writer's).

In the case of *State of Iowa vs. Old Colony Trust Co.*, decided by the Circuit Court of Appeals for the Eighth Circuit, April 1st, 1914, 215 F. R. p. 307, this being a case in which an order was given directing Receivers to abandon and dismantle a por-

tion of a railroad, and the State of Iowa and others appealed from the order, the Court said, at p. 312:

> "A railroad corporation is in an important sense a public corporation. It is dependent upon the public for its franchises to exist and carry on business, and in consideration of these franchises it assumes and must perform certain duties and obligations for the benefit of the public. Among them, as a general rule, is the duty of maintaining its entire line of road in a reasonably safe and operative condition and for a fair consideration to carry passengers and freight over it at all times whenever requested to do so. These propositions are elemental and lay down a general rule which cannot be gainsaid or denied. But there are some conditions which necessarily excuse full compliance with the requirements of these rules, and, in our opinion, the present case affords a case affords a striking example of such conditions. Here is a case where the line sought to be abandoned, is not only not self-supporting, but its continued operation jeopardizes the successful operation of the entire system of which it is merely a part. Moreover, its continued operation in its present condition is dangerous to life and property and there is no money or financial ability to improve its condition. Not only so, but there is little public necessity for its continued operation, whereas, there is a great public necessity for the continued operation of the balance of the system.
>
> "In such circumstances the railroad company may abandon such an unprofitable and irreclaimable part of its road and neither the state nor unfortunate investors along the

line can justly complain. They cannot force a railroad company to do the impossible. Jack V. Williams, (C. C.) 113 Fed. 823; Id. 76 C. C. A. 165, 145 Fed. 281; Commonwealth vs. Fitchburg Railroad Co. 12 Gray (Mass) 180; People vs. Albany & Vermont Railroad Co., 24 N. Y. 261, 82 Am. Dec. 295; Morawetz on Private Corporations, 1119."

In the case of *Jack vs. Williams,* 113 Fed. Rep., p. 823, it appeared that twelve miles of a railroad were built. The Construction Company then became insolvent and was placed in the hands of a Receiver. The Railroad Company itself was placed in the hands of a Receiver. The Receiver completed the line under certificates for three miles further. Finally the road bed and the railroad decayed and were unsafe. A sale was ordered and eventually the purchasers took up the rails. The question was whether the court could authorize the abandonment of the road. The court said:

"A railroad is in a sense a public concern. To its construction and operation the action of the sovereign is needed. If a corporation is created, the franchise to be a corporation can be given only by the sovereign. Its franchise as a common carrier for hire of passengers and freight comes from the sovereign. Its right to exercise the right of eminent domain can come only from the sovereign. And, as its road is in a sense a highway, the sovereign grants that also. The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public, the road must be

kept up in such a condition that life and property both must be made as safe as practicable. The rates of transportation of persons and freight must be reasonable. And the reasonable number of trains must be kept up, dependent upon the circumstances surrounding the railway. Whilst thus serving the public, however, no corporation or private person is obliged to continue the service without a reasonable remuneration. No one can be compelled to serve the public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. Smyth vs. Ames, 169 U. S. 467, 18 Sup. Ct. 418, 42 L. Ed. 819; Road Co. vs. Sanford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Chicago, M. & St. P. R. Co. vs. Minnessota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Railway Co. vs. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. All these cases determine that a railroad company, in the full enjoyment and use and capacity to use its franchises, cannot be compelled to exercise its franchises without reasonable remuneration. A fortiori a railroad corporation, or a person owning a railroad, cannot be compelled to operate that road, not only without remuneration, but at a loss. And this not by any means because such corporation or person is insolvent. If a citizen has the wealth of the Rothchilds, he cannot be compelled to use a dollar of his wealth for public purposes without compensation. What, then, is a person to do who becomes possessed of wholly in the case at bar several distinct efforts to sell unproductive railroad property? Sell it? But had been made, and made in vain. No bid whatever had been made except by these purchasers. The public—even that portion of the public on

the line of the road—could not be induced to make a bid on it. Repair it and put it in condition? But experience had shown that even when it was a new road, requiring no expense for repairs, it barely paid operating expenses. Could the state or the public, in the face of the fourteenth amendment, compel such an expenditure involving certain loss? Evidence has been introduced of persons who are of the opinion that the road would pay. Can such testimony override the result of actual experience? It appears also in evidence that, notwithstanding the existence of this road, dealers in cotton and farmers preferred to carry their cotton to market in wagons, rather than to ship it by rail. The difference of cost must have been small. But, small as it was, the people about the road evidently estimate the general advantage of the road at a sum still smaller. Under these circumstances, what other course could have been pursued? The roadbed was in such a condition that it could not be operated. The expenses attending its repair held out no hope of remuneration. The purchasers had lost the privilege of incorporation and retention of the franchise. They owned the property. Was it to be kept idle and useless, or could they dismantle it?" p. 827, 828.

The Court in the *Jack case supra* quoted from the case of *Kansas vs. Dodge City, M. & T. R. Co.*, 24 L. R. A. 564, as follows:

"The order prayed for should only be issued in the interest of the public. If the track is replaced there is no reasonable probability that the road will be or can be operated. If a railway will not pay its mere operating ex-

penses, the public has very little interest in the operation of the road or in its being kept in repair." p. 829.

"In Com. vs. Fitchburg R. Co., 12 Gray, 180, mandamus was refused to compel the running of passenger trains over a branch road on which this had been discontinued, after running them for a time, because they were unprofitable. The question is not as to the existence of the duty but as to its extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains are run at reasonable and moderate fares, and cannot be supported, it is because they are not needed."

Morawetz on Private Corporations says this:

"The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in operation. In such case the Company may cease operating the road, unless this be contrary to the express terms of the Charter." Mor. Priv. Corp. 1119.

The Court in the *Jack Case,* 113 F. R., quoted as follows:

"This is sustained in *Ohio & M. R. Co. vs. People* (Ill.) 11 N. E. 350. In *Coe vs. Columbus, P. & I. R. R.* (Ohio) 75 Am. Rep, 524, the Court says:

"If we are at liberty to suggest on what the legislature very probably relied for the contin-

ued operation of a railroad, once constructed, we should say it was the interest of the owners. If it can be operated profitably, the interest of those concerned will rarely, if ever, fail to keep it in operation so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss, and certainly there is no mode provided by which it can be operated at the risk of the state."

The case of "*State of South Carolina vs. Jack*" *Supra,* was appealed and affirmed in the 145th Fed. 281. On page 286 the Court says on this point:

> "As adverted to by the circuit judge, the power given by the charter was in terms permissive to build the railroad, and not mandatory to maintain it. When the condition is such as existed when the 15 miles of the rails were removed, it has been held that the owners of the road cannot be compelled to reconstruct and maintain it when it would not be remunerative. Northern Pacific R. R. vs. Dustin, 142 U. S. 492-499, 12 Sup. Ct. 283, 35 L. Ed. 1092. The fact that the road does not pay the expenses of running the trains is pursuasive evidence that the service to the public does not require it to be kept in operation." p. 286.

These last quoted decisions set forth the exceptions to the general rule, not denied, that a common carrier is under an absolute duty to operate its road; the exception being that if to operate it would mean absolute loss and jeopardize the continued operation of the whole, and there is no charter obligation

to continue, then the operation may cease. This is true whether you reach the conclusion by holding that to continue to operate would take property without due process of law, or by holding that the duty to continue is only to meet the public demands, and if the demands are not sufficient to pay the cost, then as a matter of law, the public demand does not exist.

The last line of decisions is referred to in order to show that in the extreme case of abandonment of a Railroad the Courts have measured the duty to operate by ascertaining if the public in sufficient numbers use the Railroad to pay the Company a reasonable remuneration.

IX.

Facts Do Not Even Tend to Sustain the Orders for the Six Trains.

Notwithstanding six trains were ordered operated, the testimony before the Commission, and before the Court, has never tended to show the slightest necessity for but one additional train each way, and that to be operated south of Meridian, Miss. We submit, however, that the power did not lie in the Court to substitute its judgment as to which one of the train or trains is required for that of the Commission. The Court may not select between the orders. It is confined to ascertaining whether the six orders are so unwarranted as to exceed regulation and amount to confiscation. The injunction sought

is against six orders. The six orders were entered as the result of one citation, one hearing and one judgment, and we submit that the orders should stand or fall together.

The Court is not precluded from going into the question of adequacy of the facilities. Many cases, one of which was the *A. C. L. R. R. vs. Wharton,* 207 U. S. 328, at p. 334, have held that while inherently the question of adequacy of local service is within the jurisdiction of the state commission, still since the determination of the question of violation of the Constitution of the United States depends upon the question of fact, the Court has a right to determine the fact, and is not precluded by the finding of the Commision.

In addition to this, if the Commission has not considered certain evidence under a mistaken idea of the law, it would be entirely competent for the Court to review that feature of the decision. The Commission, it is submitted, did, under a mistaken idea of law, fail to consider proper items of cost which should go into the figure of the operating expense of the trains; as is shown from the testimony of F. M. Sheppard, President of the Railroad Commission of Mississippi. (Rec. pp. 129-132).

Dr. Sheppard testified that he did not think the Railroad Company should be required to run the said passenger trains if they did not pay the operating expenses. In answer to the Court's questions he stated that by operating expenses he meant just the actual cost of operating, such as wages of train employees, oil, supplies, etc., on that one train, and that

he would not include in his calculation anything for stock killed, or any station expenses, or any part of the general burden. He further testified that he thought *one* additional train between Waynesboro and Okolona would pay a revenue of more than forty cents per train mile, (Rec. p. 131), this figure of forty cents per train mile being sufficient, in the opinion of the Commissioner, to pay the operating cost per train mile. This witness for the Commission, who was the President of the Commission, stated that the Commission did not think the trains should be operated if they failed to pay their operating expenses. If we measure the right to require the operation of these trains by the standard fixed, then none of them should have been ordered put in operation. The fact that the Commission had an erroneous idea as to what were proper items to be included in operating costs does not change the standard agreed to.

Mississippi Should not be Allowed to Secure a Preference through the Order.

This case illustrates pointedly the need of control of an interstate railway by a single National board having a comprehensive view of the demands and requirements of the several states and communities through which the carrier operates, and a like view of the duties the interstate carrier owes to each and to decide between "the sometimes conflicting interests of local and through traffic."

If there was good reason for continuing to

operate said trains in Mississippi, there was better reason for continuing the operation of these and other trains in other states, and if the railroad company had restored the trains in Mississippi and had not done so in the other states, which had consented to the withdrawal, it would have been rank discrimination against the other communities. To permit one State to provide the conveniences of travel for its citizens regardless of the rights of citizens of other states is wrong.

The trains were taken off because of an imperative need of saving money. If taking them off resulted in a loss of revenue, as claimed by the State it is manifest that they would not have been discontinued.

The record discloses that Appellee's gross revenue was falling off at the rate of $10,000.00 per day, which would amount to approximately $3,500,000.00 per annum, an enormous sum for a road the size of Appellee. It further discloses that on September 30th, 1914, there was $74,000.00 in cash in the treasury and over a million dollars of audited vouchers awaiting payment; and further that for the three months of July, August and September 1914, the Company's earnings lacked $127,000.00 of paying the fixed charges and taxes after paying operating expenses. It is difficult to see how a situation could be more critical from a business standpoint.

Confronted with this situation the Management of the Railroad Company laid out a program of economy. Every branch of service was reduced;

shops were closed, and the salaries of officials and others were reduced. The only way to reduce passenger expenses was a reduction of trains. Freight expenses reduce themselves automatically as tonnage decreases, but passenger trains have to be operated just the same for one passenger as they do for a hundred.

The Management of this interstate railroad owes a duty to the entire public it serves as well as its stockholders, and if in the conservation of its resources during a time of panic it honestly decides to reduce the luxuries of travel, not the necessities of travel, especially when the luxuries were being operated at a loss, and especially when this reduction was but a part of a general scheme of reduction, it ought, it is submitted, be allowed to exercise its judgment. If the orders had been allowed to stand the result would have been that the judgment of the Railroad Commission of Mississippi, based upon an erroneous standard, erroneously applied in a mistaken effort to aid one community in disregard of the rights of all other communities in the State of Mississippi and all other communities in all other states through which Appellee operates, and in utter disregard of the rights of Appellee, would be substituted for Appellee's judgment and the acquiesence in that judgment by the other States through which Appellee operates.

We submit that the interlocutory injunction should have been granted against said orders for the following reasons:

(1) The Commission is no where given au-

thority to make such an order, and to enforce it deprives Appellee of the equal protection of the laws, and of its property without due process of law.

(2) No one of the trains ordered operated pays its cost of operation, and Appellee is losing money on its entire business, and to enforce the orders under existing conditions will deprive Appellee of its property without due process of law.

(3) The orders, if enforced, would directly burden interstate commerce, and this Governmental agency, in that the burden of the loss incurred in operating the trains would be a tax on the income from interstate commerce, and would jeopardize the existence of this carrier as an interstate carrier and post road.

(4) The orders, if enforced, would, by destroying Appellee, impair the obligation of that contract between the United States Government, the State of Mississippi and the Mobile & Ohio Railroad Company, whereby Appellee was to remain a post road, etc.

(5) Because the passenger service now being operated is adequate, and the orders are so unreasonable as to be void.

The exercise of the judicial discretion of the Lower Court in granting the interlocutory injunction should be affirmed.

Respectfully submitted,

S. R. PRINCE,
CARL FOX,
Attorneys for Appellee.

APPENDIX

AN ACT.

TO INCORPORATE THE MOBILE AND OHIO RAILROAD COMPANY.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Alabama, in General Assembly convened, That Jonathan Emanuel, George N. Sewart, Moses Waring, Sidney Smith, John Bloodgood, Miguel D. Eslava, Samuel G. Fisher, Charles LeBaron, John A. Campbell, Archibald W. Gordon, Charles Gascoigne, Phillip Phillips, John C. Whitsett, and M. J. D. Baldwyn, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the Mobile and Ohio Railroad Company; and by that name to sue and be sued, plead and be impleaded, in any court of this State; to make and have a common seal, and the same to break, alter or amend at pleasure; and the company is hereby vested with all powers, privileges and immunities which are, or may be, necessary to carry into effect the purposes and objects of this act, hereinafter set forth; and said company is hereby authorized and empowered to locate, construct and finally complete a single, double or treble rail road or way, from some suitable point in the city of Mobile, in a western or northwesterly direction, to the west line of this State, towards the mouth of the

Ohio river, in such route as shall be deemed most expedient; and to transport, take and carry property and persons upon said rail road, or way, by the power and force of steam, or animals, or of any other mechanical or other power, or any combination of them, which said company may choose to apply; and for the purpose of constructing said rail road or way, the said company is hereby authorized to lay out their road not exceeding one hundred feet wide, through the whole length, and for the purpose of depots, cuttings and embankments, and for the purpose of necessary turnouts, and for obtaining stone and gravel, may take as much more land as may be necessary for the construction and security of said road, with permission to make any lawful contract with any other rail road corporation in relation to the business of said company, and also to make joint stock with any other railroad corporation: Provided, that all damages that may be occasioned to any person or corporation by the taking of any such land or materials aforesaid, for the purpose aforesaid, shall be paid for by said company, in manner hereinafter provided.

SECTION 2. And be it further enacted, That the capital stock of said company shall not exceed ten millions of dollars, to be divided into shares of one hundred dollars each, which shares shall be deemed personal property, and be transferred in such manner, and at such places, as the by-laws of said company shall direct; Provided, that said company may commence the construction of said road, with all the

powers and privileges contained in this act, whenever the sum subscribed to the capital stock shall exceed two hundred and fifty thousand dollars.

SECTION 3. And be it further enacted, That the persons named in the first section, or a majority of them, shall open books to receive subscriptions to the capital stock of said company, at such times and places as they, or a majority of them, may appoint; and shall give such notice of the times and places of opening said books, as they may deem reasonable; and shall receive said subscriptions under such regulations as they may adopt for the purpose; and if more than five thousand shares of stock shall be subscribed, they shall have the power to make the shares so subscribed the capital stock of said company: Provided, they shall not exceed one hundred thousand shares. And in case the subscription shall exceed one hundred thousand shares, the same shall be reduced, and apportioned in such manner as may be deemed most beneficial to the corporation.

SECTION 4. And be it further enacted, That the immediate government and direction of the affairs of said company shall be vested in a board of thirteen directors, who shall be chosen by the stock holders of said company, in the manner hereinafter provided, and shall hold their office until others are duly elected and qualified to take their places as directors; and the said directors, seven of whom,(the president being one,)shall be a quorum for the transaction of business, shall elect one of their number to be President of the Board, who shall also be Presi-

dent of said Company; they shall also choose a Secretary, and such other officers as they may deem necessary, and Treasurer, who shall give bond, with security, to said company, in such sum as the said directors may require, for the faithful discharge of his trust.

SECTION 5. And be it further enacted, That the persons authorized by the third section of this act, to open the books for subscription to the capital stock, are hereby authorized, after the books of subscription to the capital stock of said company are closed, or when the sum subscribed shall exceed two hundred and fifty thousand dollars, to call the first meeting of the stockholders of said company, in such way, and at such time and place, as they may appoint, for the choice of Directors of said company; and in all meetings of the stockholders of said company, each share shall entitled the holder thereof to one vote, which vote may be given by said stockholder in person, or by lawful proxy; and the annual meeting of the stockholders of said company, for the choice of directors, shall be holden at such time and place, and upon such notice, as the said company, in their by-laws, may prescribe.

SECTION 6. And be it further enacted, That in case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, said company shall not for that cause, be deemed to be dissolved, but such election may be holden on any day which shall be ap-

pointed by the directors of said company; and said directors shall have power to fill any vacancies which may occur by death, resignation, or otherwise.

SECTION 7. And be it further enacted, That the directors shall have full power to make and prescribe such by-laws, rules and regulations, as they shall deem needful and proper, touching the disposition and management of the stock, property, estate and effects of said company, not contrary to this charter, or the laws of this State, or of the United States; the transfer of shares, the duties and conduct of their officers and servants; touching the election of and meeting of the directors; and all matters whatsoever which may appertain to the concerns of said company. Said company is also hereby authorized to purchase, receive and hold such estate as may be necessary and convenient in accomplishing the object for which this incorporation is granted, and may by their agents, surveyors, engineers, and servants, enter upon all lands and tenements through which they may deem it necessary to make said road, and to survey, layout, and construct the same, and to agree and contract for the land, or right of way, with the owners, through which they may intend to make the said road. In case said lands belong to the estate of any deceased person, then with the executor or administrator of such; or in case of the same belonging to a minor, or person non-compos mentis, then, with his or her guardian or guardians; or in case said lands be held by trustees of school sections, or other trustees of estates, then

with such trustees; and the said executors, administrators, guardians and trustees are hereby declared competent for such estate, or minor, to contract with said company for the right to use, occupy and possess the lands of such estates, minors or trustees, so far as may be useful or necessary to the purposes of said rail road; and the act and deed of such executors, administrator, guardians or trustee, in relation thereto, shall pass the title in said land in the same manner as if the said deed or act was made or done by a legal owner, of full age; and such executor, administrator, guardian or trustee, shall account to those interested, upon their respective bonds, for the amount paid him in pursuance of such agreement and composition; and if the said company and parties representing lands prefer, they may refer the question of compensation to arbitrators, mutually chosen, whose award, or that of their umpire, in case of disagreement, shall vest title according to its terms.

SECTION 8. And be it further enacted, That if the said company cannot agree with the owner of the land, through which they desire said road to pass, or with the executor, administrator, guardian or trustee, it shall, and may be lawful, for the clerk of the circuit court of the county in which said land lies, on the application of said company, or its agents, and he is required to issue a writ of ad quod damnum commanding the sheriff, that without delay he cause a jury of six good and lawful men to be upon such land on a day to be by said sheriff fixed

and appointed, and whereof it shall be his duty to give notice to the owner, executor, administrator, guardian or trustee, at least five days before such day, if they be within his county; or if not, or if the owner or owners be unknown, then notice shall be given by advertisement, to be by said sheriff posted and fixed at the dwelling house, if such there be, or in a public and conspicuous place, at least five days before such appointed day, and also by advertising the same in some newspaper published nearest the land, at least three weeks by weekly insertions, prior to said day; and then cause said jury, after being duly sworn by said sheriff, or justice of the peace, to make true inquest of the damage, that will be sustained by such owner or estate, by reason of making said road through such land. If any such juror shall fail to appear, or by reason of challenge for cause, or otherwise fail to sit on said inquest, the said sheriff shall fill said jury from the by standers, and if they fail to render a verdict, the said sheriff shall again on the same or a subsequent day, empannel a new jury or jurors, until a verdict be had, such verdict and inquest, regularly certified by such sheriff, shall be returned to the office of the clerk of the circuit court of the county in which said land may be, and there remain among the records; and such verdict shall vest in said company the right to occupy and use such land for the purposes of said rail road, on the payment, or tender of payment of the damages thereon assessed, against said company; and in case of persons absent, or unknown as

aforesaid, the placing of the amount of such damages, to the credit of the owner, in the hands of the judge of the county court of the county in which such lands may lie, shall be deemed, and taken as payment; and such judges shall be liable on their bonds, to make due payment of said money on demand.

SECTION 9. And be it further enacted, That it shall be the duty of the sheriff, to appoint and hold said inquest within ten days after the receipt of said writ of ad quod damnum, except in cases of absence aforesaid, in which case, thirty days shall be allowed him, and five days in addition are allowed him for every additional jury which he may have under said writ; and for every default therein, the said sheriff shall be fined by the circuit court, at the instance of either party, not less than twenty nor more than one hundred dollars; and every juror and witness summoned, shall be fined not less than ten dollars for non-attendance; of all such fines, as well as costs, the circuit court of the county shall have jurisdiction. There shall be allowed the following fees: to the clerk of the circuit court, for every writ of ad quad damnum, seventy-five cents: for receiving and filing inquest, seventy-five cents; to the sheriff for giving notice, seventy-five cents, besides printer's fees not exceeding two dollars in each case; for holding inquest five dollars; and for summoning witnesses, twenty-five cents each; to jurors seventy-five cents per diem, each; which fees are not allowed until a verdict be returned and filed, and shall be taxed in the bill of

costs, and paid by the company; provided, however, that before the application for said writ, the said company may make a tender to the owner or owners of any such land, a sum of money, by them deemed equivalent to the damage to be sustained, and upon refusal to accept the sum tendered, and a verdict for the same amount or a less sum, the costs shall be taxed to, and paid by the owners of the land, upon which inquest is held.

SECTION 10. And be it further enacted, That said company is hereby authorized to construct, erect, build, and use a single, double or treble railway, or road, of suitable width and dimensions to be determined by the directors of said company, on the line or course by them designated, and also, under the same rules, regulations and restrictions, and with the like privileges and immunities, as are herein granted to the main rail road, to build and construct branch rail roads on either side of the main road, not exceeding thirty miles, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll houses and other buildings for the accommodation of their concerns, as they may deem suitable for their interests.

SECTION 11. And be it further enacted, That whenever it shall be necessary for the construction of their single, double, or treble rail road or way, to intersect or cross any stream of water or water course, or any road or highway, it shall be lawful

for said company to construct across or upon the same; but the said company shall restore the said stream or water course or road or highway thus intersected to its former state, or in sufficient manner not to impair its usefulness, and in all cases where any road or public highway is so located, that said rail road cannot be judiciously laid out and constructed across or upon the same, without interfering therewith, in such case or cases said corporation may, by their engineer, cause such road or roads to be changed or altered in such manner, that said rail road may be made on the best site of ground for that purpose: Provided, said corporation shall put such road in as good repair as at the time of changing or altering the same.

SECTION 12. And be it further enacted, That it shall be lawful for the company hereby incorporated, from time to time, to fix, regulate, and receive the toll and charges by them to be received, for transportation of persons or property, on their rail road or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof.

SECTION 13. And be it further enacted, That if any person or persons will, or shall wilfully do or cause to be done any act or acts whatsoever, whereby any building, construction or works of said company, or any engine, machine or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person so offending, shall be deemed

guilty of a misdemeanor, and shall forfeit and pay to said company, double the amount of damages sustained by reason of such offences or injury, to be recovered, in the name of said corporation, with costs of suit by action of debt.

SECTION 14. And be it further enacted, That the directors of said company may require the payment of the sum or sums subscribed to the capital stock of said company, at such times and in such proportions, and upon such conditions as they may deem fit; and in case any stockholder shall refuse or neglect to make payment pursuant to the requisition of the board of directors, the stock of such stockholder, or so much as shall be necessary, may be sold by the directors of said corporation at public auction, after the lapse of ninety days, from the time when the payment became due, and the surplus money, the avails of such sale, after deducting the payment due, and interest thereon, and the necessary expenses of sale, shall be paid over to such delinquent stock holder.

SECTION 15. And be it further enacted, That the property owned by the said company shall, at all times be subject to taxation, in the same manner, and to the same extent, as similar property owned by private individuals.

SECTION 16. And be it further enacted, That if the railroad shall not be commenced in five years from the passage of this act, and shall not be finished within this State, in ten years from the time of the

commencement thereof, then this act shall be null and void.

Approved, Ferbuary 3, 1848.

AN ACT TO INCORPORATE THE MOBILE AND OHIO RAILROAD COMPANY.

Whereas, the State of Alabama, by an act approved 3d February, A. D. 1848, enacted as follows:

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Alabama, in General Assembly convened, That Jonathan Emanuel, George N. Sewart, Moses Waring, Sidney Smith, John Bloodgood, Miguel D. Eslava, Samuel G. Fisher, Charles L. Banon, John A. Campbell, Archibald W. Gordon, Charles Gascoigne, Phillip Phillips, John C. Whitsett, and M. J. D. Baldwyn, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the Mobile and Ohio Railroad Company; and by that name to sue and be sued, plead and be impleaded, in any court of this State; to make and have a common seal, and the same to break, alter or amend at pleasure; and the company is hereby vested with all powers, privileges and immunities which are, or may be, necessary to carry into effect the purposes and objects of this act, hereinafter set forth; and said company is hereby authorized and empowered to locate, construct and finally complete a single, double or treble rail road or way, from some suitable point in the city of Mobile, in a western or northwesterly direction, to the west line of this State, towards the mouth of the

Ohio river, in such route as shall be deemed most expedient; and to transport, take and carry property and persons upon said rail road, or way, by the power and force of steam, or animals, or of any other mechanical or other power, or any combination of them, which said company may choose to apply; and for the purpose of constructing said rail road or way, the said company is hereby authorized to lay out their road not exceeding one hundred feet wide, through the whole length, and for the purpose of depots, cuttings and embankments, and for the purpose of necessary turnouts, and for obtaining stone and gravel, may take as much more land as may be necessary for the construction and security of said road, with permission to make any lawful contract with any other rail road corporation in relation to the business of said company, and also to make joint stock with any other railroad corporation: Provided, that all damages that may be occasioned to any person or corporation by the taking of any such land or materials aforesaid, for the purpose aforesaid, shall be paid for by said company, in manner hereinafter provided.

SECTION 2. And be it further enacted, That the capital stock of said company shall not exceed ten millions of dollars, to be divided into shares of one hundred dollars each, which shares shall be deemed personal property, and be transferred in such manner, and at such places, as the by-laws of said company shall direct; Provided, that said company may commence the construction of said road, with all the

powers and privileges contained in this act, whenever the sum subscribed to the capital stock shall exceed two hundred and fifty thousand dollars.

SECTION 3. And be it further enacted, That the persons named in the first section, or a majority of them, shall open books to receive subscriptions to the capital stock of said company, at such times and places as they, or a majority of them, may appoint; and shall give such notice of the times and places of opening said books, as they may deem reasonable; and shall receive said subscriptions under such regulations as they may adopt for the purpose; and if more than five thousand shares of stock shall be subscribed, they shall have the power to make the shares so subscribed the capital stock of said company: Provided, they shall not exceed one hundred thousand shares. And in case the subscription shall exceed one hundred thousand shares, the same shall be reduced, and apportioned in such manner as may be deemed most beneficial to the corporation.

SECTION 4. And be it further enacted, That the immediate government and direction of the affairs of said company shall be vested in a board of thirteen directors, who shall be chosen by the stock holders of said company, in the manner hereinafter provided, and shall hold their office until others are duly elected and qualified to take their places as directors; and the said directors, seven of whom,(the president being one,)shall be a quorum for the transaction of business, shall elect one of their number to be President of the Board, who shall also be Presi-

dent of said Company; they shall also choose a Secretary, and such other officers as they may deem necessary, and Treasurer, who shall give bond, with security, to said company, in such sum as the said directors may require, for the faithful discharge of his trust.

SECTION 5. And be it further enacted, That the persons authorized by the third section of this act, to open the books for subscription to the capital stock, are hereby authorized, after the books of subscription to the capital stock of said company are closed, or when the sum subscribed shall exceed two hundred and fifty thousand dollars, to call the first meeting of the stockholders of said company, in such way, and at such time and place, as they may appoint, for the choice of Directors of said company; and in all meetings of the stockholders of said company, each share shall entitled the holder thereof to one vote, which vote may be given by said stockholder in person, or by lawful proxy; and the annual meeting of the stockholders of said company, for the choice of directors, shall be holden at such time and place, and upon such notice, as the said company, in their by-laws, may prescribe.

SECTION 6. And be it further enacted, That in case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, said company shall not for that cause, be deemed to be dissolved, but such election may be holden on any day which shall be ap-

pointed by the directors of said company; and said directors sh[illegible]ave power to fill any vacancies which may occu[illegible]ath, resignation, or otherwise.

SECTION 7. And be it further enacted, That the directors shall have full power to make and prescribe such by-laws, rules and regulations, as they shall deem needful and proper, touching the disposition and management of the stock, property, estate and effects of said company, not contrary to this charter, or the laws of this State, or of the United States; the transfer of shares, the duties and conduct of their officers and servants; touching the election of and meeting of the directors; and all matters whatsoever which may appertain to the concerns of said company. Said company is also hereby authorized to purchase, receive and hold such estate as may be necessary and convenient in accomplishing the object for which this incorporation is granted, and may by their agents, surveyors, engineers, and servants, enter upon all lands and tenements through which they may deem it necessary to make said road, and to survey, layout, and construct the same, and to agree and contract for the land, or right of way, with the owners, through which they may intend to make the said road. In case said lands belong to the estate of any deceased person, then with the executor or administrator of such; or in case of the same belonging to a minor, or person non-compos mentis, then, with his or her guardian or guardians; or in case said lands be held by trustees of school sections, or other trustees of estates, then

with such trustees; and the said executors, administrators, guardians and trustees are hereby declared competent for such estate, or minor, to contract with said company for the right to use, occupy and possess the lands of such estates, minors or trustees, so far as may be useful or necessary to the purposes of said rail road; and the act and deed of such executors, administrator, guardians or trustee, in relation thereto, shall pass the title in said land in the same manner as if the said deed or act was made or done by a legal owner, of full age; and such executor, administrator, guardian or trustee, shall account to those interested, upon their respective bonds, for the amount paid him in pursuance of such agreement and composition; and if the said company and parties representing lands prefer, they may refer the question of compensation to arbitrators, mutually chosen, whose award, or that of their umpire, in case of disagreement, shall vest title according to its terms.

SECTION 8. And be it further enacted, That if the said company cannot agree with the owner of the land, through which they desire said road to pass, or with the executor, administrator, guardian or trustee, it shall, and may be lawful, for the clerk of the circuit court of the county in which said land lies, on the application of said company, or its agents, and he is required to issue a writ of ad quod damnum commanding the sheriff, that without delay he cause a jury of six good and lawful men to be upon such land on a day to be by said sheriff fixed

and appointed, and whereof it shall be his duty to give notice to the owner, executor, administrator, guardian or trustee, at least five days before such day, if they be within his county; or if not, or if the owner or owners be unknown, then notice shall be given by advertisement, to be by said sheriff posted and fixed at the dwelling house, if such there be, or in a public and conspicuous place, at least five days before such appointed day, and also by advertising the same in some newspaper published nearest the land, at least three weeks by weekly insertions, prior to said day; and then cause said jury, after being duly sworn by said sheriff, or justice of the peace, to make true inquest of the damage, that will be sustained by such owner or estate, by reason of making said road through such land. If any such juror shall fail to appear, or by reason of challenge for cause, or otherwise fail to sit on said inquest, the said sheriff shall fill said jury from the by standers, and if they fail to render a verdict, the said sheriff shall again on the same or a subsequent day, empannel a new jury or jurors, until a verdict be had, such verdict and inquest, regularly certified by such sheriff, shall be returned to the office of the clerk of the circuit court of the county in which said land may be, and there remain among the records; and such verdict shall vest in said company the right to occupy and use such land for the purposes of said rail road, on the payment, or tender of payment of the damages thereon assessed, against said company; and in case of persons absent, or unknown as

aforesaid, the placing of the amount of such damages, to the credit of the owner, in the hands of the judge of the county court of the county in which such lands may lie, shall be deemed, and taken as payment; and such judges shall be liable on their bonds, to make due payment of said money on demand.

SECTION 9. And be it further enacted, That it shall be the duty of the sheriff, to appoint and hold said inquest within ten days after the receipt of said writ of ad quod damnum, except in cases of absence aforesaid, in which case, thirty days shall be allowed him, and five days in addition are allowed him for every additional jury which he may have under under said writ; and for every default therein, the said sheriff shall be fined by the circuit court, at the instance of either party, not less than twenty nor more than one hundred dollars; and every juror and witness summoned, shall be fined not less than ten dollars for non-attendance; of all such fines, as well as costs, the circuit court of the county shall have jurisdiction. There shall be allowed the following fees: to the clerk of the circuit court, for every writ of ad quad damnum, seventy-five cents: for receiving and filing inquest, seventy-five cents; to the sheriff for giving notice, seventy-five cents, besides printer's fees not exceeding two dollars in each case; for holding inquest five dollars; and for summoning witnesses, twenty-five cents each; to jurors seventy-five cents per diem, each; which fees are not allowed until a verdict be returned and filed, and shall be taxed in the bill of

costs, and paid by the company; provided, however, that before the application for said writ, the said company may make a tender to the owner or owners of any such land, a sum of money, by them deemed equivalent to the damage to be sustained, and upon refusal to accept the sum tendered, and a verdict for the same amount or a less sum, the costs shall be taxed to, and paid by the owners of the land, upon which inquest is held.

SECTION 10. And be it further enacted, That said company is hereby authorized to construct, erect, build, and use a single, double or treble railway, or road, of suitable width and dimensions to be determined by the directors of said company, on the line or course by them designated, and also, under the same rules, regulations and restrictions, and with the like privileges and immunities, as are herein granted to the main rail road, to build and construct branch rail roads on either side of the main road, not exceeding thirty miles, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll houses and other buildings for the accommodation of their concerns, as they may deem suitable for their interests.

SECTION 11. And be it further enacted, That whenever it shall be necessary for the construction of their single, double, or treble rail road or way, to intersect or cross any stream of water or water course, or any road or highway, it shall be lawful

for said company to construct across or upon the same; but the said company shall restore the said stream or water course or road or highway thus intersected to its former state, or in sufficient manner not to impair its usefulness, and in all cases where any road or public highway is so located, that said rail road cannot be judiciously laid out and constructed across or upon the same, without interfering therewith, in such case or cases said corporation may, by their engineer, cause such road or roads to be changed or altered in such manner, that said rail road may be made on the best site of ground for that purpose: Provided, said corporation shall put such road in as good repair as at the time of changing or altering the same.

SECTION 12. And be it further enacted, That it shall be lawful for the company hereby incorporated, from time to time, to fix, regulate, and receive the toll and charges by them to be received, for transportation of persons or property, on their rail road or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof.

SECTION 13. And be it further enacted, That if any person or persons will, or shall wilfully do or cause to be done any act or acts whatsoever, whereby any building, construction or works of said company, or any engine, machine or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person so offending, shall be deemed

guilty of a misdemeanor, and shall forfeit and pay to said company, double the amount of damages sustained by reason of such offences or injury, to be recovered, in the name of said corporation, with costs of suit by action of debt.

SECTION 14. And be it further enacted, That the directors of said company may require the payment of the sum or sums subscribed to the capital stock of said company, at such times and in such proportions, and upon such conditions as they may deem fit; and in case any stockholder shall refuse or neglect to make payment pursuant to the requisition of the board of directors, the stock of such stockholder, or so much as shall be necessary, may be sold by the directors of said corporation at public auction, after the lapse of ninety days, from the time when the payment became due, and the surplus money, the avails of such sale, after deducting the payment due, and interest thereon, and the necessary expenses of sale, shall be paid over to such delinquent stock holder.

SECTION 15. And be it further enacted, That the property owned by the said company shall, at all times be subject to taxation, in the same manner, and to the same extent, as similar property owned by private individuals.

SECTION 16. And be it further enacted, That if the railroad shall not be commenced in five years from the passage of this act, and shall not be finished within this State, in ten years from the time of the

commencement thereof, then this act shall be null and void.

Approved, February 4, 1848.

And WHEREAS, the State of Mississippi is desirous to aid in accomplishing the objects of the said act, therefore,

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the railroad described in the above recited act be extended in the State of Mississippi from the Alabama line to the State of Tennessee, in such a direction and on such a route as shall be deemed most expedient; and that as to said extension, there is granted to the said Mobile and Ohio railroad company, when organized, the same rights, powers, and privileges as are granted to it within the State of Alabama by the same act, subject, however, to the same and similar conditions, restrictions, modifications, and provisions as are in said act above recited, contained, and set forth, excepting the provision contained in section 15, of said act; and the said act is hereby concurred in and adopted within the State of Mississippi, in reference to the said railroad as extended and in reference to the said Mobile & Ohio Railroad company, with the exception of that portion contained in section 15, as before stated: Provided, that in case of persons absent or unknown, whose lands may be condemned pursuant to sections 7, 8, and 9, of said recited set, the placing of the amount of the damages assessed to the credit of the owner

in the hands of the state treasurer shall be taken as payment; and on such owner appearing or tendering satisfactory evidence of his claims thereto, such damages shall be paid him by the treasurer on the warrant of the auditor of public accounts.

SECTION 2. Be it further enacted, That the said Mobile and Ohio railroad company shall have full power and authority to cross with their railway tracks any railroad in the State of Mississippi, which may have been chartered prior to the passage of this act.

SECTION 3. Be it further enacted, That whenever any portion of said railroad shall be completed through this State, and is paying an interest of eight per cent. per annum on its costs, and not before, such portion may be taxed the same per centage and no more upon the capital expended in the construction thereof, as lands in this State shall be taxed.

SECTION 4. Be it further enacted, That so much of the eighth section of the above recited act of the legislature of the State of Alabama which requires certain damages therein mentioned to be placed at the credit of the owner in the hands of the county treasurer of the counties in which such land may lie, be repealed, and that all such damages shall be placed in the hands of the county treasurer in which the land may lie; and such deposite in the

hands of each county treasurer shall be deemed and taken as payment; and each county treasurer shall be liable on their official bonds to make due payment of said money on demand.

Approved February 17, 1848.

STATE